Supreme Court, U.S.
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No. 97-___

In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTIONS PRESENTED

1. Does anything in the United States Constitution prohibit state court jurisdiction over claims that state governments have deviated from their obligations, under the federal Constitution's Guarantee Clause, to provide republican government?

2. Do the political question holdings in Luther v. Borden, 48 U.S. (7 How.) 1 (1984) and Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), which are derived from the federal Constitution's separation of powers structure, prohibit state court jurisdiction over claims that state governments have deviated from their obligations under the Guarantee Clause?

3. Does the federal Constitution's Supremacy Clause require state courts to decide claims that state governments have deviated from their Guarantee Clause obligations?

4. If Luther and Pacific States apply to the states at all, do they prohibit state court jurisdiction over narrowly focused Guarantee Clause claims which challenge the legitimacy of specific enactments of state governments; or do those cases only prohibit jurisdiction over Guarantee Clause claims which challenge the entire legitimacy of state governments?

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PETITION FOR CERTIORARI

Petitioner, the Honorable L.L. Sawyer, Judge of the Circuit Court of the State of Oregon for Jackson County, respectfully prays that this Court issue a writ of certiorari to review the Oregon Supreme Court's judgment and opinion in the above-entitled case.

OPINION BELOW

The opinion of the Oregon Supreme Court is reported at State ex rel. Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997). A copy of the opinion is appended to this petition. See App 1-72. A copy of the Oregon court's order denying Judge Sawyer's petition for reconsideration also is appended to this petition. See Appendix 73.

Part III.A of the majority opinion, and part 2 of the dissent, address the issue of state court jurisdiction over Guarantee Clause claims. 324 Or. at 617-26 (majority), 644-53 (dissent). Only those parts are the subject of this petition.

JURISDICTION

The Oregon Supreme Court issued its opinion on February 21, 1997, and issued its order denying Judge Sawyer's petition for reconsideration on April 22, 1997. This petition is filed within 90 days of the date of the Oregon Supreme Court's denial of his petition for reconsideration, as required by Supreme Court Rule 13.1.

The case presents a substantial question of federal law, and the question was properly presented in the Oregon Supreme Court. The Oregon court's ruling on the question cannot be sustained on independent state law grounds. For these reasons, this Court has jurisdiction to review the state court's decision in this case. 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL PROVISIONS PRIMARILY INVOLVED

This case primarily involves two constitutional provisio The first is the Guarantee Clause, which in pertinent part provides: "The United States shall guarantee to every Stat this Union a Republican Form of Government . . . ." U.S Const. Art. IV, § 4.

The second provision is the Supremacy Clause. In pertinent part, it provides:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in Constitution or the Laws of any State to the Contrary notwithstanding.
>
> The . . . executive and judicial Officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .

U.S. Const. Art. VI.

STATEMENT OF THE CASE

This case originates from sentencing decisions petitioner Judge L.L. Sawyer made, following a trial over which he presided. A jury found Bobby Ron Vanzant guilty of the crime of second-degree manslaughter. State v. Vanzant, Jackson County Circuit Court Case No. 952538CC2. Unde the Oregon Sentencing Guidelines, Vanzant's presumptive-sentence range was 19 to 20 months' imprisonment. Or. Admin. Rules, ch. 213, App. 1 (1995). However, a 1994 initiated law, called Ballot Measure 11, mandated a minimu of 75 months' imprisonment. See Or. Rev. Stat. § 137.700(2)(e) (1995). At sentencing, Judge Sawyer ruled th

Measure 11 violates federal equal protection. He then gave Vanzant a presumptive sentence of 20 months.

The state petitioned the Oregon Supreme Court to issue a writ of mandamus, compelling Judge Sawyer to resentence Vanzant in accordance with Measure 11. See generally Or. Rev. Stat. § 34.150 to 34.240 (1995) (regarding mandamus actions); Or. Rules App. Proc. 11.05 to 11.15 (1996) (same). The state constitution confers on the Oregon Supreme Court original jurisdiction over mandamus proceedings. Or. Const. Am. Art. VII, § 2 ("the supreme court may, in its discretion, take original jurisdiction in mandamus. . . proceedings").

The Oregon Public Defender's Office accepted Judge Sawyer's request to represent him in the mandamus proceeding. The office filed a memorandum in opposition to the state's mandamus petition. The office argued that the writ should not issue, because the state had an "adequate remedy in the ordinary course of law," Or. Rev. Stat. § 34.110 (1995), i.e., a direct appeal.

The Oregon Supreme Court determined that it had probable jurisdiction, and issued an alternative writ of mandamus. Judge Sawyer moved to dismiss the alternative writ, and the court set the matter for briefing. In its opening brief, the state challenged the judge's equal protection ruling.

Judge Sawyer authorized the Public Defender's Office to rely on any alternative claims the office deemed appropriate, in support of his declaring Measure 11 unconstitutional.[1] The

---

[1] Oregon law would allow this even in a direct appeal. The state constitution provides:

> If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error

(continued...)

office filed a brief which defended the judge's equal protection ruling. The brief also advanced various alternative claims, including a Guarantee Clause claim. The state filed a reply brief which, inter alia, answered the Guarantee Clause claim.

The Oregon Supreme Court held that the state had no direct appeal from the Judge Sawyer's sentencing decisions, and, therefore, that the court had mandamus jurisdiction. Sawyer, 324 Or. at 600-08. It then rejected all of the challenges to Measure 11 on the merits, except the Guarantee Clause claim. Relying principally on this Court's decision in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), a four-member majority held that it could "not reach the merits of [the] claim," because it lacked jurisdiction. Sawyer at 618. The court issued a peremptory writ of mandamus, ordering Judge Sawyer to resentence Vanzant under Measure 11.[2] Sawyer at 630. See also Appendix 74-75 (peremptory writ).

Two judges dissented from the majority's holding on the Guarantee Clause claim. See Id. at 631 (Durham, J.), 653 (Fadeley, J.). They said the court had jurisdiction over it, and that the claim raises "important questions" which "deserve further focused briefing . . . and perhaps further oral argument." Id. at 651 (Durham, J., dissenting).

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[1](...continued)
committed during the trial . . . .
Or. Const. Am. Art. VII, § 3. Under this provision, if "the ruling of the trial judge is correct on any ground it will be upheld, even though his reasons for the ruling may have been erroneous." Rader v. Gibbons & Reed Co., 261 Or. 354, 365 n. 3, 494 P.2d 412 (1972).

[2] Resentencing currently is scheduled for July 30, 1997.

REASONS FOR GRANTING THE WRIT

A. Introduction.

In Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874), this Court held: "The guaranty [of a republican form of government] necessarily implies a duty on the part of the States themselves to provide such a government." Id. at 175. The Court explained the genesis of this implied duty:

> All of the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide.

Id. at 175-76.

The State of Oregon, including its supreme court, has never disputed that it is obliged to provide a republican government. The state has only disputed what its obligation entails, and whether courts have jurisdiction over claims that the state has failed to meet its obligation.

On the merits, the issue the Oregon Supreme Court confronted (and would confront again, should this Court remand) is whether the manner in which the initiative system was used in enacting a particular law, deviated from the requirements of republican government. See Sawyer, 324 Or. at 618 n. 17 (summarizing Guarantee Clause claim). It is immaterial that as a general principle, initiative systems are constitutional. Likewise, it is immaterial that the enacted law may be substantively legitimate, when tested by other constitutional requirements (e.g., due process and equal

protection). What matters is that a law created through an abuse of an otherwise constitutional process is invalid, notwithstanding the law's substantive legitimacy. Cf. Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating portion of balanced-budget act, which assigned executive branch function to legislative branch official, for official could not exercise assigned function without violating separation of powers).

In ruling that courts lack jurisdiction over Guarantee Clause claims, the Oregon court rejected its statement, in State v. Montez, 309 Or. 564, 603, 789 P.2d 1352 (1990), that state court's have jurisdiction over such claims. Sawyer, 324 Or. at 621 n. 19. According to the Oregon court, Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) imposes a federal separation of powers principle--the political question doctrine--onto the states, which prohibits state court jurisdiction over Guarantee Clause claims. Sawyer, 324 Or. at 618-26. The accuracy of that reading of Pacific States is suspect, for this Court otherwise has consistently held that the federal Constitution does not impose its separation structure onto the states. Moreover, imposing such a structural requirement onto the states implicates federalism concerns at least as much as applying federal retirement age standards on state judges, Gregory v. Ashcroft, 501 U.S. 452 (1991), or requiring county sheriffs to check and report on the status of hopeful gun buyers. See Pritz v. United States, 65 U.S.L.W. 4731 (1977).

Furthermore, under the Oregon court's reading of Pacific States, the Constitution simultaneously:

(a) obliges the states to maintain republican government (the Guarantee Clause), but

(b) forbids state courts from reviewing claims that their states' structures or processes breach their republican obligations (separation of powers).

Such a reading of the separation of powers provisions effectively nullifies the Supremacy Clause, in cases involving Guarantee Clause claims. It thereby contravenes the long-standing canon of construction, that courts "construe the constitution as to give effect to [multiple] provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other." E.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393 (1821) (Marshall, C.J.).

Moreover, the Framers' intent in requiring republican government was to minimize factional dominance over state government. See generally The Federalist No. 10 (J. Madison). By removing state judicial review of Guarantee Clause claims, the Oregon court's ruling removes a safeguard against such factional dominance. By removing this safeguard against factional dominance, the Oregon court's ruling facilitates precisely what the Framers wanted to minimize. The ruling thus contravenes another long-standing canon of construction: that courts "construe [constitutional provisions] as to preserve the true intent and meaning of the instrument." Cohens, 19 U.S. at 393.

In sum, the significance of the issues in this case go well "beyond the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). As is more fully explained below, certiorari is warranted.

B. Conflicts with and misapplications of this Court's decisions.

In 1903, the Oregon Supreme Court said that the state's newly created initiative system meets the requirements of republican government. This is so, the court explained, because initiated laws "are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will." Kadderly v. Portland, 44 Or. 118, 145-46, 74 P. 710, 75 P. 222 (1903) (dictum).

Six years later, the court decided a utility company's Guarantee Clause claim against an initiated tax. In it, the utility forcefully attacked the initiative system generally. The Oregon court relied on Kadderly's dictum to reject the utility's claim. Oregon v. Pacific States Tel. & Tel. Co., 53 Or. 162, 166, 99 P. 427 (1909).

On a writ of error, the utility renewed its Guarantee Clause claim in this Court. The Court viewed the claim as an "assault. . . not on the tax as a tax, but on the state as a state." Pacific States, 223 U.S. at 150. Relying on Luther v. Borden, 48 U.S. (7 How.) 1 (1984), which it deemed "the leading and absolutely controlling case," the Pacific States Court held that the Constitution committed such claims solely to Congress, so that under the political question doctrine, the Court could not decide the claim. Id. at 143-51.

Thus, the question in Pacific States was whether a **federal** court, specifically, this Court, had jurisdiction over a Guarantee Clause claim which the Court viewed as a challenge to the legitimacy of an entire state government. The instant case presents an entirely different question. In this case, the question is whether a **state** court has jurisdiction over a Guarantee Clause challenge to the legitimacy of a specific state law.

In answering the question in the case sub judice, the Oregon court relied mainly on this Court's decision in Pacific States (so by necessity, it relied mainly on Luther--Pacific States's progenitor). The Oregon court's answer to the question was that **all** Guarantee Clause claims present political questions which even state courts may not decide. Sawyer, 324 Or. at 618.

That is the wrong answer. The right answer is summarized as follows:

(a) Only the federal political question doctrine prohibits jurisdiction over Guarantee Clause claims.

(b) The political question doctrine is a subpart of the federal Constitution's separation of powers system.

(c) The federal Constitution does not impose its separation system onto the states.

(d) Therefore, the federal political question doctrine does not apply to the states.

(e) Furthermore, the Supremacy Clause generally requires state courts to decide Guarantee Clause claims.

Baker v. Carr, 369 U.S. 186 (1962) confirms part (a) of this summary. It explains

> that it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' **and no other feature**, which could render them nonjusticiable. Specifically, we have said that such claims **are not held nonjusticiable** because they touch matters of state governmental organizations.

Baker, 369 U.S. at 229 (emphasis added).

Baker also confirms part (b)--that the political question doctrine is a subpart of the federal separation system. In

deciding the equal protection claim in Baker, the Court "deem[ed] it necessary first to consider the contours of the 'political question' doctrine." 369 U.S. at 210. In addressing those contours, the Court essentially began with a conclusion. It stated that its

> review [of the doctrine] reveals that in the Guaranty Clause cases and in the other "political question" cases, it is **the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States**, which gives rise to the "political question."
>
> . . . The nonjusticiability of a political question **is primarily a function of the separation of powers**.

Id. (emphasis added). Later the Court reiterated that Guarantee Clause "claims **are not held nonjusticiable** because they touch matters of state governmental organizations." Baker, 369 U.S. at 229 (emphasis added).

Baker teaches that the political question doctrine **is not** based on any sort of federalism principle. It instead is based on the federal judiciary's "relationship" to the other two "coordinate branches of the Federal Government"; it is "primarily a function of the separation of powers." Baker thus makes clear that the political question doctrine is a subpart of the federal constitution's separation of powers structure.

Regarding the summary's part (c), various of this Court's cases confirm that the federal Constitution does not impose its separation structure onto the states. For example, in addressing an equal protection claim brought against a former mayor of Philadelphia, this Court said, "The Constitution does not impose on the States any particular plan for the distribution of governmental powers." Mayor v. Educ. Equality League, 415 U.S. 605, 615 n. 13 (1974) (citing Sweezy v. New

Hampshire, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring)). Similarly, in addressing a due process claim brought against a state's indeterminate sentencing system, this Court said that whether a state should emulate the federal constitution's separation of powers structure "is for the determination of the State." Dreyer v. Illinois, 187 U.S. 71, 84 (1902).

Parts (b) and (c) ineluctably lead to the summary's part (d): Because the political question doctrine is a subpart of the federal separation of powers structure, and because the federal Constitution does not impose its separation structure onto the states, the federal political question doctrine is not imposed on the states, either. Any other conclusion illogically would apply a **sub**set (the political question doctrine), in a situation where the **super**set (separation of powers structure) does not apply.

Howlett v. Rose, 496 U.S. 356 (1990) confirms the summary's part (e). It holds: "The Supremacy Clause makes [federal] laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." Id. at 367. State courts must enforce the federal law at issue, even if federal jurisdictional standards would bar federal courts from deciding the issue's merits. Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution"); New York State Club Ass'n v. New York City, 487 U.S. 1, 8 n. 2 (1987) (same); Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1951) (same).

Thus, part (e) is correct: The Supremacy Clause generally requires state courts to adjudicate Guarantee Clause claims.

The question then is whether the Oregon court erred when it declined to review the Guarantee Clause claim in this case.

In holding that it lacked jurisdiction over the claim, the Oregon court relied solely on the federal political question doctrine. Sawyer, 324 Or at 618-26. Thus, the Oregon court's decision "is not based on an adequate and independent state ground." Asarco, 490 U.S. at 625. As previously explained, the federal law on which the Oregon court exclusively relied--the political question doctrine--has no application in state court proceedings. Consequently, the Supremacy Clause required the Oregon court to decide the Guarantee Clause claim. Howlett, 496 U.S. at 367. The court erred when it declined to do so.

The court essentially gave three reasons for its decision. Perhaps its main reason was that several decades ago, this Court affirmed two state court decisions which relied on federal political question doctrine cases, including Pacific States, in declining to decide the merits of Guarantee Clause claims. Sawyer, 324 Or. at 622-23 (citing State v. Mountain Timber Co., 75 Wash. 581, 590, 135 P. 645 (1913), aff'd, 243 U.S. 219 (1917); Cochran v. Louisiana State Bd. of Educ., 168 La. 1030, 1032-33, 123 So. 664 (1928), aff'd, 281 U.S. 370 (1930)). But those affirmances do not mean what the Oregon court thinks they mean.

In both Mountain Timber and Cochran, the plaintiffs lossed Fourteenth Amendment and Guarantee Clause claims in the state courts. On review to this court, the plaintiffs renewed both types of claims. This Court **had** jurisdiction over the plaintiffs' Fourteenth Amendment claims, but it lacked jurisdiction over their Guarantee Clause claims. Because it had jurisdiction over the Fourteenth Amendment claims, the Court could not "dismiss [the cases] for want of jurisdiction," as it did in Pacific States, 223 U.S. at 151. Instead, the Court

either had to affirm or reverse the state courts' judgments. In both cases, the plaintiffs' Fourteenth Amendment claims were meritless, so the Court affirmed. Cochran, 281 U.S. at 374-75; Mountain Timber, 243 U.S. at 235, 246.

Thus, the Supreme Court's affirmances only pertain to the state courts' rejections of the Fourteenth Amendment claims. The affirmances cannot and do not pertain to the Guarantee Clause claims, for the Court lacked jurisdiction to rule on them. As the Asarco Court said, "We have no authority to grant a writ only to announce that, solely because we may not review a case, the state court lacked power to decide it in the first instance." 490 U.S. at 620-21.

Besides, in both Mountain Timber and Cochran, the plaintiffs did not raise the question presented here: Whether the federal Constitution prohibits state court jurisdiction over narrowly focused Guarantee Clause claims and, if not, whether the Supremacy Clause requires state courts to decide such claims. Brief of Plaintiff in Error at 10-13, Mountain Timber (No. 332); Brief for Appellants at 26, Cochran (No. 468). Because the plaintiffs did not present that limited question, the defendants did not respond to it. The defendants merely said what they should have said under the circumstances: Under political question cases such as Pacific States, this Court lacks jurisdiction over the plaintiffs' Guarantee Clause claims. Brief of Defendant in Error at 23, Mountain Timber; Brief of Appellees at 16-19, Cochran.

Because the plaintiffs did not raise the limited question, and no one briefed it, this Court did not address the question, much less answer it. Consequently, Mountain Timber and Cochran neither address nor decide the issue in this case. United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (where issue "was not there raised in briefs or argument nor discussed in the opinion of the Court," it "was

passed sub silentio," and the prior decision is not stare decisis in a later case which squarely presents the issue). Nevertheless, the Oregon court treated Mountain Timber and Cochran as though they do decide the issue. By doing so, the court ascribed to those cases a significance they do not have.

Another of the Oregon court's reasons for its jurisdictional holding is based on the principle that "a State may not impose such greater restrictions as a matter of **federal constitutional law** when this Court specifically refrains from imposing them." Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original). Relying on this principle, the Oregon court said

> [I]f the United States Supreme Court has held squarely that Guarantee Clause claims are not justiciable in state and federal courts, then we lack the authority to determine that such claims are justiciable in state courts. . . . We read the Supreme Court's pertinent cases as so holding.

Sawyer, 324 Or. at 621 n. 19.

Contrary to the Oregon court's reading, none of this Court's cases explicitly holds that state courts lack jurisdiction over Guarantee Clause claims. Moreover, comparing Pacific States with Hass is inappropriate, for the two cases are incomparable.

In Hass, this Court described the scope of the substantive limitations on state action, imposed by the Fifth Amendment's self-incrimination clause. Consequently, Hass bears on judicial decisions which, as a matter of federal constitutional law, impose substantive limitations on state action.

In contrast, the Pacific States Court did not, for example, question the holding in Minor, that the Guarantee Clause imposes republican obligations onto the states. All the Court

said was that it could not describe those obligations, for it lacked jurisdiction to do so. Because Pacific States imposed no substantive limitations on state action, it does not implicate the principle from Hass.

On the other hand, if Congress were to enact a valid law which exhaustively describes the states' obligations under the Guarantee Clause, then perhaps under a principle analogous to the one in Hass, state courts could not enlarge them. But cf. Boerne v. Flores, 65 U.S.L.W. 4612 (1997) (invalidating congressional pronouncement of substantive scope of Free Exercise Clause). But Congress has enacted no such law, so there is no congressional analog to the Hass principle. What there is instead is the Supremacy Clause, which requires state courts to identify the states' republican government obligations, and to hold the states to those obligations. Howlett, 496 U.S. at 367.

The last of the Oregon court's reasons for its jurisdictional holding is based on the concern that in light of the political question holding in Pacific States, allowing state courts to decide Guarantee Clause claims

> would run afoul of the principle that the Supreme Court is the final arbiter of the federal constitution and that it sits, in part, to ensure that the state courts interpret federal law uniformly.

Sawyer, 324 Or. at 623 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)). See also Asarco, 490 U.S. at 621-22.

The issue in Martin was whether this Court could review the validity of state court pronouncements of the scope of this Court's jurisdiction. See 14 U.S. at 323-24. This Court had to be the final arbiter of its own jurisdiction. It could not

leave something so critical to its own viability, to the vary pronouncements of state courts.

Nothing similar is at stake, with respect to state court decisions on the legitimacy of their own states' governmen structures and processes. In the first place, the Guarantee Clause subsumes a federalism principle, Gregory, 501 U.S 463, so it countenances a good deal of diversity among stat court decisions. Moreover, state courts would not interpre and apply the clause in isolation. As they have in the past- example, when they followed the Oregon court's Kadderly decision--state courts would read and, to varying degrees, follow one another's Guarantee Clause decisions.

In any event, even if as the Oregon Supreme Court believes, state courts' Guarantee Clause decisions are not reviewable in federal court, the proper response is **not** for s courts to ignore the Supremacy Clause, and abstain from deciding the federal claims. Instead, the proper response is state courts to decide the claims, while recognizing that the decisions may not have preclusive effect. Asarco, 490 U.S 621 (Court's emphasis).[3] Either that, or accept that allowin "state courts to decide important questions of federal law without the possibility of review in this Court . . . [is] a rat unremarkable proposition." Asarco, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part). After all, a nonreviewable state court

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[3] Because of the mandatory nature of the peremptory writ of mandamus, see Appendix 74-75, this "apparent exception to normal preclusion doctrines," id. at 622, will not apply at resentencing in State v Vanzant. Unless Judge Sawyer relies on a claim against Measure 11's validity which the Oregon Supreme Court left open, he will have to impo the Measure 11 minimum. See also Or. Rev. Stat. § 34.150 (1995) (peremptory writ leaves defendant no choice but to perform its command Or. Rev. Stat. § 34.230 (1995) (defendant may incur $500 fine for failin perform peremptory writ's command).

> interpretation of federal law may affect the governance of the State and thereby make some people better off and some worse off. . . . [There is] no reason to fear that our dismissal of. . . [an] appeal [of such an interpretation] would lead to a legal landscape in which we would no longer have the opportunity to review many questions of federal law.

Id. at 636-37.

Finally, this reason for the Oregon court's decision could be self-defeating. It will not necessarily harmonize official rulings on Guarantee Clause claims, for it cannot prohibit other state officials from deciding them.

For example, Oregon's Secretary of State is the executive officer who controls which initiative measures may be submitted to a vote. Or. Const. Art. IV, § 4. He may refuse to submit a measure if "it is not such a measure as can be submitted to the people through the initiative." Holmes v. Appling, 237 Or. 546, 552, 392 P.2d 636 (1964). His decisions on whether to submit a measure are subject to judicial review. See Holmes, 237 Or. at 547-49.[4]

At least one commentator suggests that because initiated constitutional amendments are not subject to review by the

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[4] The state constitution allows citizens to initiate constitutional **amendments**. Or. Const. Art. IV, § 1(2). The legislative assembly also can refer amendments to the electorate, and **only** the assembly can refer wholesale **revisions** of the constitution to the electorate. Or. Const. Art. XVII, §§ 1-2.

Holmes involved a **substitute** constitution which the assembly failed to refer (by one senate vote). Two former governors spearheaded an initiative drive to put the new constitution before the electorate. The Secretary of State determined that the substitute constitution was not an amendment, so it was an improper subject for an initiative. He refused to submit it to the electorate. The Holmes court affirmed both his refusal, and the basis for his refusal.

state's representative legislative assembly, the Guarantee Clause prohibits them. Julian A. Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 746 (1994). This suggestion finds support in Oregon jurisprudence: Because initiated constitutional amendments "may [not] be amended or repealed by the legislature at will," they violate the Guarantee Clause. Kadderly, 44 Or. at 145-46.

Oregon's Secretary of State could rely on Kadderly and Professor Eule's suggestion, and declare that the state law which permits initiated constitutional amendments, Or. Const. Art. IV, § 1(2)(a), violates the Guarantee Clause. He then could declare that the Supremacy Clause prohibits him from placing such amendments on the ballot. Surely such a declaration would incite disharmony among other government officials, and among the electorate in general. But under the Oregon Supreme Court's decision, the state judiciary could not review the secretary's declarations. The decision thus could countenance disharmony (albeit intrastate), where disharmony is what the court wanted to avoid.

In sum, the Oregon court's decision is potentially self-defeating, and is based on misreadings and misapplications of such cases as Luther, Pacific States, Mountain Timber, Cochran, and Martin. Moreover, the decision conflicts with such cases as Howlett and Asarco. The decision warrants certiorari. See Bullington v. Missouri, 451 U.S. 430, 432 (1981) (certiorari granted where state court erroneously extended application of a prior decision of this Court); Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (certiorari granted, because state court "read Miranda [v. Arizona, 384 U.S. 436 (1966)] too broadly").

1. Federalism concerns.

This Court's federalism decisions amplify the importance of the issue in this case. The states "retain substantial sovereign authority under our constitutional system." Gregory, 501 U.S. at 457. This Court rigorously examines laws which would diminish state sovereignty, particularly those which would restrict "a State's constitutional responsibility for the establishment and operation of its own government . . . ." Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

The Oregon court reads Pacific States as creating a blanket injunction on state court authority to decide Guarantee Clause claims, and as committing those claims exclusively to Congress. Not only that, but the Oregon court reads Pacific States as uniquely applying to the states a component of the **federal** separation of powers structure (the political question doctrine). This reading conflicts with Baker's statement that Guaranty Clause "claims **are not** held nonjusticiable because they touch matters of state governmental organizations. Baker, 369 U.S. at 229 (emphasis added). Moreover, it diminishes Oregon's sovereignty, for it restricts the state's "constitutional responsibility for the establishment and operation of its own government . . . ." Sugarman, 413 U.S. at 648.

The Oregon court's decision thus "present[s] important questions touching the accommodation of state and federal interests under the Constitution." Kosydar v. Nat'l Cash Register Co., 417 U.S. 62, 65 (1974). The decision warrants certiorari.

2. Republican government concerns.

Recent experience with initiative systems shows that petitioners are increasingly using it to propose constitutional amendments. The merits of this case involves a claim that such use of the initiative conflicts with principles republican

government. This Court is **not** being asked to decide the validity of that claim (that decision is for the Oregon court, in the event of a remand). Nevertheless, the existence of the claim crystallizes the importance of the jurisdictional issue this Court is being asked to decide.

The 1996 general election exemplifies the burgeoning use of the initiative to propose constitutional amendments. The Oregon electorate considered 16 initiative measures, nine of which were constitutional amendments. See 1 Official 1996 General Election Voters' Pamphlet--Statewide Measures. Many of the proposed amendments involved general policy concepts which normally would be proposed as statutes. See, e.g., Id. at 200 (Ballot Measure 45; raising retirement age for public employees). Petitioners frequently proposed their concepts as amendments, to immunize them from review by the legislative assembly, in the event they passed.

For example, the chief petitioners for one of the nine constitutional initiatives, Ballot Measure 40, successfully proposed a statutory initiative in 1986. During the 1996 campaign, the chief petitioners claimed that after their 1986 measure's enactment, various elected and appointed officials "set about eliminating parts of it . . . ." Voters Pamphlet at 142 (Argument in Favor of Measure 40).[5] They used that claim to explain why they drafted their 1996 measure as a constitutional amendment. They said, "We now realize we should have made the 1986 measure a Constitutional Amendment. This would have made it impossible to change without a vote of the people." Pamphlet at 142.

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[5] The legislative history of an initiative includes such information as "arguments for and against the measure included in the voters' pamphlet . . . ." Ecumenical Ministries v. Oregon State Lottery Comm'n, 318 Or. 551, 559-60 n. 8, 871 P.2d 106 (1994).

The initiative which underlies this case, 1994's Measure 11, is not a constitutional amendment, but it is not a typical statute, either. Normally, the legislative assembly can amend or repeal initiated statutes "at will." Kadderly, 44 Or. at 146. However, the Oregon electorate adopted Measure 11 with a companion, Measure **10**. The companion amended the constitution to require "a two-thirds vote of all the members elected to each house" of the legislative assembly, to mitigate Measure 11's sentencing scheme in any way. Or. Const. Art. IV, § 33.

Measure 10 thus transforms Measure 11 into a "super-statute." As the chief petitioner of Measures 10 and 11 explained, Measure 10 requires the assembly to secure veto-proof super-majorities, to mitigate the severity of Measure 11. See Official 1994 General Election Voters' Pamphlet 53. So in effect, if any assembly bill which is subject to Measure 10 manages to come up for a floor vote, it shares equal status to a bill that comes up for a veto override.

If the Oregon court had followed its statement in Montez, that state courts have jurisdiction over Guarantee Clause claims, it then could have applied the Kadderly principle to decide whether Measure 10's transforming Measure 11 into a super-statute deviates from the principles of republican government.[6] Such a decision could have answered whether the electorate may make its general policy decisions paramount

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[6] In rejecting one of the equal protection claims against Measure 11, the Oregon court said that Measure 10 "is not at issue in this proceeding." Sawyer, 324 Or. at 627. That statement does not refer to the Guarantee Clause claim. See Id. at 618 n. 17 (quoting summary of Guarantee Clause claims against Measure 11, one of which is independent of Measure 10). See also Id. at 651 (Durham, J., dissenting) (after stating that the court has jurisdiction over the claims, stating that "[t]he effect of [Measure 10] on the question of compliance of Ballot Measure 11 with the Guarantee Clause is . . . uncertain").

to the legislative assembly's. Moreover, the decision would have been instructive on the question of whether in a republic, initiative petitioners may propose general policy concepts as constitutional amendments, to immunize them from review by the legislative assembly. See The Federalist No. 49, at 329 (J. Madison or A. Hamilton) (Modern Library ed. 1937) ("[t]he danger of disturbing the public tranquility by interesting too strongly the public passions, is a . . . serious objection against a frequent reference of constitutional questions to the decision of the whole society").

In sum, this case starts with a use of the initiative system which may be antithetical to republican government. It then proceeds to an Oregon Supreme Court decision which declares that state courts must abstain from deciding "an important federal question" about the meaning and application of the Guarantee Clause. Supreme Court Rule 10(c). As previously explained, the Oregon court reached its decision "in a way that conflicts with [and misapplies several] relevant decisions of this Court." Id. A writ of certiorari is warranted. See, e.g., Hudson v. Louisiana, 450 U.S. 40, 42 (1981).

C. Conflicts among state court decisions.

As just explained, this case involves "an important federal question . . . ." Supreme Court Rule 10(b). The Oregon court's decision on it conflicts with post-Pacific States decisions of at least two other state courts of last resort, which hold that the federal political question doctrine does not prohibit state court jurisdiction over Guarantee Clause claims. In re. Initiative Petition No. 48, 820 P.2d 772, 779-81 (Okla. 1991); Van Sickle v. Shanahan, 213 Kan 426, 511 P.2d 223, 242-44 (1973). It also conflicts with post-Pacific States decisions of several other state courts, which assumed jurisdiction over Guarantee Clause claims, and did so without either mentioning or deciding the political question doctrine's

possible application. See, e.g., Cagle v. Qualified Electors of Winston, 470 So.2d 1208, 1210-11 (Ala. 1985); W.E. Tucker Oil Co., Inc. v. Portland Bank, 285 Ark. 453, 688 S.W.2d 293, 294 (1985); State v. Lehtola, 198 N.W.2d 354, 356 (Wis. 1972); Riggins v. Dist. Court of Salt Lake County, 51 P.2d 645, 653 (Utah 1935); Sarlls v. State, 166 N.E. 270, 279-80 and n. 7 (Ind. 1929); Weaver v. Cuff, 216 N.W. 600, 601 (S.D. 1927); Santee Mills v. Query, 115 S.E. 202, 205-06 (S.C. 1922).

This state court conflict perhaps is epitomized by the Washington Supreme Court's recent rejection of a Guarantee Clause claim against that state's "three-strikes" law. The Washington court determined that under the federal political question doctrine, it lacked jurisdiction, but then it decided the claim anyway. State v. Manussier, 129 Wash. 2d 652, 670-72 and n. 66, 921 P.2d 473 (1996). Thus, the Oregon court's decision is both consistent and inconsistent with the Washington court's.

This array of inconsistency among state court decisions, on this important federal question, demonstrates that a writ of certiorari is warranted. Supreme Court Rule 10(b) (certiorari is warranted where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort"). See also Fuller v. Oregon, 417 U.S. 40, 42 (1974) (certiorari granted owing to "the importance of the question presented and the conflict of opinion [among state courts] on the constitutional issue involved").

D. Continuing controversy over political question doctrine.

The Oregon court concluded that this Court's opinion in Pacific States sweeps so "broadly" that it declares that Guarantee Clause claims are "not a proper subject for either **state** or federal courts." Sawyer, 324 Or at 622 (emphasis

added). This reading of Pacific States is as debatable as the case is controversial.

In New York v. United States, 505 U.S. 144 (1992), this Court confronted a Guarantee Clause claim. The Court acknowledged the on-going debate over its political question holdings. The Court questioned how its decision in Pacific States's progenitor, Luther v. Borden, has "metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'" New York, 505 U.S. at 184 (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946)).

"This view," the Court explained, "has not always been accepted." Id. Before Luther's "metamorphosis,"

> the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. [Citing post-Luther cases.]
>
> More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. See Reynolds v. Sims, 377 U.S. 533, 582 (1964) ("some questions raised under the Guarantee Clause are nonjusticiable"). Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. [Citing treatises and articles.]

New York, 505 U.S. at 184-85. The Court then summarily rejected the Guarantee Clause claim **on the merits**. Id. at 185.

After deeming New York's Guarantee Clause discussion dictum, the Oregon court followed Pacific States's application of the political question doctrine, to reach its jurisdictional ruling. Sawyer, 324 Or. at 626. But as New York shows, the doctrine's application to Guarantee Clause claims is unsettled within this Court's jurisprudence (as well as among the decisions of various of the states' highest courts).

For example, the Baker Court said "that it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' and no other feature, which **could** render them nonjusticiable." 369 U.S. at 229 (emphasis added). This Court recently explained that "a controversy is nonjusticiable--i.e., involves a political question--where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ." Clinton v. Jones, 65 U.S.L.W. 4372, 4378 n. 34 (1997) (internal quotations omitted).

A textual review of the Guarantee Clause shows no commitment to a particular political department. Instead, the clause says, "**The United States** shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. Const. Art. IV, § 4 (emphasis added). The clause does not specify a particular federal branch as the guarantor of republican government; therefore, it includes, rather then excludes, the judicial branch. Moreover, several cases--including some from this Court--already have identified and applied workable Guarantee Clause standards. See Note, Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause, 68 N.Y.U. L. Rev. 870, 903-05 (1993) (summarizing republican principles applied in various state court decisions, and in pre- and post-Pacific States decisions of this Court).

Thus, the political question doctrine does not encompass the entire universe of Guarantee Clause claims. As this Court has said, "**some** questions raised under the Guarantee Clause are nonjusticiable . . . ." Reynolds, 377 U.S. at 582 (emphasis added). In other words, some Guarantee Clause claims may present political questions, but others do not.

For example, in Kohler v. Tugwell, 292 F. Supp. 978, 979 (E.D. La. 1968), aff'd mem., 393 U.S. 531 (1969), a three-judge panel confronted a claim that a "ballot [so] misled

voters" that they "were deprived of their right to vote, and were denied both Due Process of Law and the right to a Republican Form of Government." (Footnote omitted.) The court unanimously rejected the due process claim, id. at 981, but split two-to-one on the Guarantee Clause claim.

The majority determined that the court had jurisdiction over the Guarantee Clause claim. The majority explained, "The nature of the question, . . . and not the mere invocation of the clause, determines whether the contention is justiciable and the clause is judicially enforceable." Id. at 985 (Wisdom, Cir. J., concurring). Judge Wisdom then concluded that the court could use due process standards to decide the Guarantee Clause claim. Id. He applied those standards, and rejected the Guarantee Clause claim. Id.

On the other hand, in Luther, this Court confronted a Guarantee Clause claim that sought a decision on which of two political factions was the rightful government of Rhode Island. The Court held that the claim was a political question over which it lacked jurisdiction. The Baker Court explained Luther's jurisdictional holding: Accepting the claim could have thrown Rhode Island state government into complete disarray, so it "would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution." Baker, 369 U.S. at 219.

The Guarantee Clause claim the Oregon court confronted in this case is nothing like the claim in Luther. No one asked the court to rule that Oregon's state government is being run by usurpers. No one even asked the court to rule that the initiative system is nonrepublican. Cf. Rice v. Foster, 4 Del. (4 Harr.) 479, 499 (1846) (assembly bill which allowed liquor licenses to be issued by popular elections "tends to subvert our representative republican form of government . . . and is null and void"). All that was sought from the Oregon court was a ruling on a claim that the manner in which the initiative system

was used in enacting a particular law deviated from the requirements of republican government. This relatively modest claim is so different from the claim in Luther, that Luther should have had no bearing on the jurisdictional question. Tucker Truck Lines, Inc., 344 U.S. at 38.

Nevertheless, the Oregon court relied on Luther (for it relied on Luther's direct progeny, Pacific States), to hold that it lacked jurisdiction. As explained above, this reliance was improper. Moreover, the fact that it occurred in the context of an important federal constitutional question which itself is the subject of "continuing . . . controversy," demonstrates that this case warrants certiorari. Gideon v. Wainwright, 372 U.S. 335, 337-38 and n. 2 (1963). See also Bullington, 451 U.S. at 432.

CONCLUSION

This case involves an Oregon Supreme Court decision in which the court held that it lacked jurisdiction over a republican Guarantee Clause claim. The court based its decision on certain of this Court's political question cases (Pacific States Tel. & Tel. v. Oregon, in particular). The Oregon court's reading of those cases conflicts with the decisions of various state courts, and with the decision of at least one lower federal court. Moreover, the meaning of those cases is the subject of debate even within this Court.

The Oregon court's jurisdictional holding is based on the federal political question doctrine. That doctrine is part of the federal separation of powers structure, and the Constitution does not impose that structure onto the states. Therefore, the Oregon court's holding is erroneous. The court had jurisdiction over the federal Guarantee Clause claim. The court violated the Supremacy Clause when it declined to decide the claim.

This case thus presents a substantial question of federal law. The question was properly presented in the state court, and the state court's ruling cannot be sustained on independent state law grounds. This Court has jurisdiction. It should issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court.

Respectfully submitted,

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Deputy Public Defender

Attorneys for Petitioner

APPENDICES

App 1

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON ex rel Mark HUDDLESTON
District Attorney for Jackson County,
Plaintiff-Relator,

v.

Honorable L.L. SAWYER,
Judge of the Circuit Court of the
State of Oregon for Jackson County,
Defendant.

(SC S42938)*

Original proceeding in mandamus.

Argued and Submitted Sept. 9, 1996.

Decided Feb. 21, 1997.

Timothy A. Sylwester, Assistant Attorney Genera
Salem, argued the cause for relator. With him on the br
were Theodore R. Kulongoski, Attorney General, Virgin
Linder, Solicitor General, and Eleanor E. Wallace, Assis
Attorney General.

Jesse Wm. Barton, Deputy Public Defender, Sale
argued the cause for defendant. With him on the brief w
Sally L. Avera, Public Defender.

Before Carson, Chief Justice, and Gillette, Van
Hoomissen, Fadeley, Graber and Durham, Justices.

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* Relating to Jackson County Circuit Court No. 952538CC2.

Peremptory writ to issue.

Durham, J., filed opinion concurring in part and dissenting in part.

Fadeley, J., dissented in part and joioned in part 2 of Durham, J.'s opinion.

GRABER, J.

The facts pertinent to this original mandamus proceeding are not in dispute.

Relator is the District Attorney for Jackson County. Defendant is a judge of the Circuit Court for Jackson County.

Relator represents the State of Oregon in State v. Bobby Ron Vanzant, Jackson County Circuit Court Case No. 952538CC2. In that case, Vanzant was charged by indictment with first-degree manslaughter, based on an act that he had committed on June 18, 1995. On October 9, 1995, a jury convicted Vanzant of the lesser-included offense of second-degree manslaughter, in violation of ORS 163.125(1)(a).[1] Defendant was the trial judge and sentencing judge.

ORS 137.700(2)(e) provides that a judge imposing sentence on a person convicted of second-degree manslaughter

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[1] ORS 163.125(1)(a) provides that criminal homicide is second-degree manslaughter when "[i]t is committed recklessly." Second-degree manslaughter is a Class B felony. ORS 163.125(2). Therefore, the maximum prison sentence allowed by law for the conviction is 10 years. ORS 161.605(2).

must order the person to serve at least 75 months in prison.[2] ORS 137.700 is the codification of Measure 11, which was adopted by the people in 1994.[3] Before being sentenced, Vanzant filed a memorandum in which he argued that ORS 137.700 is facially unconstitutional for several reasons. Relator filed a response, contending that ORS 137.700 is valid. After a hearing, defendant rejected Vanzant's various challenges to ORS 137.700, but he went on to rule sua sponte that the statute is facially unconstitutional under the Equal Protection Clause of the United States Constitution and that the statute is, therefore, unenforceable.

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[2] ORS 137.700 provides in part:

> "(1) When a person is convicted of one of the offenses listed in subsection (2) of this section and the offense was committed on or after April 1, 1995, the court shall impose, and the person shall serve, at least the entire term of imprisonment listed in subsection (2) of this section. The person is not, during the service of the term of imprisonment, eligible for release on post-prison supervision or any form of temporary leave from custody. The person is not eligible for any reduction in the sentence for any reason whatsoever under ORS 421.120, 421.121 or any other statute. The court may impose a greater sentence if otherwise permitted by law, but may not impose a lower sentence than the sentence specified in subsection (2) of this section.
>
> "(2) The offenses to which subsection (1) of this section applies and the applicable mandatory minimum sentences are:
>
> " * * * * *
>
> "(e) Manslaughter in the second degree, as defined in ORS 163.125 [:] 75 months."

[3] In this opinion, we use the terms Measure 11 and ORS 137.700 interchangeably.

Thereafter, at sentencing, defendant placed Vanzant's conviction into grid block 8-H and imposed a 20-month presumptive sentence under the sentencing guidelines. Over relator's objection, defendant refused to impose the 75-month minimum sentence prescribed by ORS 137.700(2)(e). On December 22, 1995, judgment was entered on the conviction and sentence.

On January 12, 1996, relator filed a petition for an alternative writ of mandamus. This court issued an alternative writ, and the present proceeding ensued.[4] For the reasons that follow, we now direct the issuance of a peremptory writ of mandamus, requiring defendant to enter a corrected judgment in State v. Bobby Ron Vanzant, Jackson County Case No. 952538CC2, that imposes sentence for the crime of second-degree manslaughter in accordance with ORS 137.700(2)(e).

I. APPROPRIATENESS OF MANDAMUS AS A REMEDY

Defendant asserts that mandamus is not an appropriate remedy, because the state can appeal from the judgment in the underlying case and thereby has a plain, speedy, and adequate remedy in the ordinary course of the law. See State ex rel. LeVasseur v. Merten, 297 Or. 577, 579-80, 686 P.2d 366

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[4] Because Vanzant is the real party in interest, the State Public Defender's Office has appeared on behalf of defendant, pursuant to ORS 34.130(4). Defendant has consented to that appearance, pursuant to ORS 34.130(4) and ORAP 11.10(1).

In this case, as we have said, defendant in fact rejected many of the legal arguments now pursued by the State Public Defender's Office on behalf of the real party in interest, Vanzant. For that reason, we will refer to Vanzant, rather than defendant, as the party who is pressing those claims that defendant rejected in the underlying criminal proceeding.

(1984) (ordinarily mandamus will not lie if there is a plain, speedy, and adequate remedy in the course of the law).[5]

Appellate review is governed by statute. Henry and Henry, 301 Or. 185, 188, 721 P.2d 430 (1986). Under ORS 138.060(5), the state has a right to appeal a sentence "as provided in ORS 138.222."

ORS 138.222 provides that appellate courts may not review certain sentences. ORS 138.222(2) provides in part:

> "On appeal from a judgment of conviction entered for a felony committed on or after November 1, 1989, the appellate court shall not review: (a) Any sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission."

Relator argues that ORS 138.222(2)(a) applies and that it precludes appellate review of the issues presented.

ORS 138.222(2) further provides that "the appellate court shall not review:"

> "(e) Except as authorized in subsections (3) and (4) of this section, any other issue related to sentencing."

Subsection (3) relates to departure sentences, which are not involved here. Subsection (4)(a) states that "the appellate court may review a claim that * * * [t]he sentencing court failed to comply with requirements of law in imposing or failing to

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[5] Under our mandamus jurisprudence, it is the remedy, not the statute creating the remedy, that must be "plain." If a statute, however ambiguous, grants a right to an appeal respecting the disputed issue, for example, then the remedy--appeal--ordinarily precludes mandamus. Accordingly, it is our task simply to construe the relevant appellate statute. Compare the separate opinion of Durham, J., 324 Or. at 631-36.

comply with requirements of law in imposing or failing to impose a sentence." Defendant argues that ORS 138.222(4)(a) authorizes review of the state's claims on appeal in State v. Vanzant.

The parties' arguments require us to engage in a two-step inquiry. The first step is to determine whether the court is being asked to "review" "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission"--that is, whether ORS 138.222(2)(a) applies. If the answer is "yes," the second step is to determine whether review under ORS 138.222(4)(a) is available nonetheless.

We turn first to the meaning of ORS 138.222(2)(a). ORS 137.651 to 137.671 provide for the establishment and functioning of the Oregon Criminal Justice Commission (Commission), which is referred to in the statute that we are interpreting. The Commission's authority includes rule-making. ORS 137.673. ORS 137.669 provides that the felony sentencing guidelines adopted by the Commission and approved by the legislature

> "shall control the sentences for all crimes committed after the effective date of such guidelines. Except as provided in ORS 137.671, the incarcerative guidelines and any other guidelines so designated by the commission shall be mandatory and constitute presumptive sentences." (Emphasis added.)

ORS 137.671 provides:

> "(1) The court may impose a sentence outside the presumptive sentence or sentence range made presumptive under ORS 137.669 for a specific offense if it finds there are substantial and compelling reasons justifying a deviation from the presumptive sentence.

> "(2) Whenever the court imposes a sentence outside the presumptive sentence it shall set forth the reasons for its decision in the manner required by rules of the Oregon Criminal Justice Commission." (Emphasis added.)

The statutes do not define the term "presumptive sentence." The Commission has, however, defined that term by rule:

> "'Presumptive Sentence' means the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history." OAR 253-03-001(16).

> "'Grid Block' means a box on the grid formed by the intersection of the crime seriousness ranking of a current crime of conviction and an offender's criminal history classification." OAR 253-03-001(10).

> "'Grid' means the Sentencing Guidelines Grid set forth [as an appendix to the Commission's rules.]" OAR 253-003-001(9).

From the relevant statutes and from the Commission's rules, it is clear that a "presumptive sentence" does not mean a statutorily mandated term of imprisonment that does or may apply to a particular conviction. ORS 137.637 provides:

> "When a determinate sentence of imprisonment is required or authorized by statute, the sentence imposed shall be the determinate sentence or the sentence as provided by the rules of the Oregon Criminal Justice Commission, whichever is longer." (Emphasis added.)

As explained above, it is only the latter type of sentence, not the former, that can be "the presumptive sentence" as that term is used in the statute. ORS 137.669, ORS 137.671. Echoing the provisions of ORS 137.637, OAR 253-09-001 provides in part:

> "(1) If a mandatory prison sentence is required or authorized by statute, the sentence imposed shall be that determinate sentence or the sentence under these rules whichever is longer.
>
> "(2) If the provisions of ORS 137.635 [providing mandatory determinate sentences for certain specified felony convictions], require the imprisonment of an offender for whom the grid provides presumptive probation, the offender shall be imprisoned for a duration determined as follows: "[listing months of imprisonment for offenses classified in various grid blocks.]"

See also State v. Jones, 315 Or. 225, 231, 844 P.2d 188 (1992) ("a sentence is a 'mandatory minimum sentence' if it is statutorily required").

The felony sentencing guidelines thus contain a means to harmonize potential conflicts between "the presumptive sentence" and a longer, statutorily mandated term of imprisonment. That being so, the enactment or operation of a statutorily mandated term of imprisonment does not erase the applicability of the felony sentencing guidelines as a whole and does not alter the meaning of the term "presumptive sentence," which is expressly defined by rule.

Nothing in Measure 11 interferes with that reconciliation of "the presumptive sentence," prescribed by the felony sentencing guidelines, with a statutorily mandated term of imprisonment. For example, ORS 137.700(1) provides that

"[t]he court may impose a greater sentence [than the specified minimum] if otherwise permitted by law." With respect to each offense listed in ORS 137.700(2), except murder, the minimum sentence prescribed by ORS 137.700 is significantly less than the maximum sentence already prescribed for that offense by ORS 161.605.[6] Here, for example, the minimum prison sentence prescribed by ORS 137.700(2)(e) for Vanzant's conviction is 75 months, while the maximum prison sentence allowed by law for that conviction is 10 years (120 months), ORS 161.605(2). Although the statutorily mandated term of imprisonment likely will exceed "the presumptive sentence" prescribed by the felony sentencing guidelines in most cases, (1) that will not necessarily be true in all cases and (2) the sentencing court may use the criteria for departure sentences in the guidelines to impose a sentence greater than the statutorily mandated minimum, even when the offense is listed in ORS 137.700(2).

Defendant's argument may be read to suggest that Measure 11 impliedly repealed the sentencing guidelines for all covered crimes, so that it is a legal impossibility to impose a "presumptive sentence" with respect to a Measure 11 crime. We disagree.

> "The doctrine of implied repeal of statutes is that when the legislature enacts a subsequent statute which is repugnant to or in conflict with a prior statute, but contains no language expressly repealing the prior statute, the prior statute is impliedly repealed." State v. Shumway, 291 Or. 153, 160, 630 P.2d 796 (1981).

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[6] With respect to murder, the minimum sentence prescribed by ORS 137.700 is the same as the minimum sentence prescribed by ORS 163.115(5)(b)--25 years.

See also Anthony et al. v. Veatch et al., 189 Or. 462, 481, 220 P.2d 493, 221 P.2d 575 (1950) ("If earlier and later statutes are in irreconcilable conflict, then the earlier must yield to the later by implied repeal." (citations omitted)). Repeal by implication is "not favored." State ex rel. Med. Pear Co. v. Fowler, 207 Or. 182, 195, 295 P.2d 167 (1956). It must be established by "'plain, unavoidable, and irreconcilable repugnancy.'" Shumway, 291 Or. at 162, 630 P.2d 796 (quoting Messick v. Duby, 86 Or. 366, 371, 168 P. 628 (1917)).

We have explained above how the sentencing guidelines and Measure 11 can be harmonized to give effect to both. In that circumstance, no implied repeal has occurred.

From the text and context of ORS 138.222(2)(a), we conclude that the phrase "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission," found in that statute, refers only to "the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history." OAR 253-03-001(16). By definition, then, "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission" refers to a specified number of months of incarceration for a conviction that has been placed in the proper grid block.

Defendant placed Vanzant's conviction into grid block 8-H of the felony sentencing guidelines and imposed a 20-month sentence. It is undisputed that Vanzant's conviction properly falls into grid block 8-H; that "the presumptive sentence" provided for a conviction in grid block 8-H is 19 to 20 months; that the 20-month sentence thereby is "within" that presumptive sentence; and that Vanzant's conviction is subject to the felony sentencing guidelines as well as to ORS 137.700.

That being so, Vanzant's sentence of 20 months is a "sentence that is within the presumptive sentence prescribed by" the felony sentencing guidelines, within the meaning of ORS 138.222(2)(a).

The only remaining issue under ORS 138.222(2)(a) is whether relator is seeking appellate "review" of that sentence. What relator calls into question here is the number of months of incarceration to which Vanzant has been sentenced, even though his conviction has been placed in the proper grid block. What relator seeks is a different sentence that is not "within the presumptive sentence," for a conviction that has been placed in the proper grid block. Thus, from the text of ORS 138.222(2)(a), relator is seeking "review" of a "sentence that is within the presumptive sentence prescribed by" the felony sentencing guidelines.

Context supports the foregoing reading. ORS 138.222(3) provides for the limited bases on which a challenge is available "[i]n any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence." That section reinforces the conclusion that no such bases are available in an appeal from a judgment of conviction imposing a presumptive sentence. ORS 138.222(4)(b) allows the appellate court to review a claim that "[t]he sentencing court erred in ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes." That section reinforces the conclusion that appellate review is not available to challenge a presumptive sentence when a conviction is placed in the proper grid block.

If text and context leave any doubt as to the intended scope of the limitation of "review" of a "sentence that is within the presumptive sentence prescribed by" the felony sentencing guidelines, legislative history quiets that doubt. In his

statement on the Senate floor, which preceded the passage of the sentencing guidelines bill that included ORS 138.222, Senator Springer explained that the drafters "worked very closely to limit those circumstances in which an appeal may be taken." Tape Recording, Senate Floor Debate, June 15, 1989, Tape 184, Side A. Senator Springer noted that 30 to 35 percent of the Court of Appeals' substantial workload then involved sentencing-related criminal cases and that the drafters intended to be sensitive to that workload. Ibid. To that end, "we provide that the court will not review * * * if the sentence is within the presumptive sentence provided by the rules." Ibid.

Senator Springer then discussed the other situations in which there would be no review, followed by a discussion of "those areas in which we would permit an appeal." Ibid. As to those areas, "the Court of Appeals is going to be looking just at a few issues," none of which included the kind of situation presented here. Ibid.

Specifically with regard to the state's right to seek appellate review, Senator Springer said in part:

> "And another important measure I want to point out, just in closing on this section, is you'll find that, for the first time, the state is given the opportunity to appeal the sentence if they feel that the judge has made an error in finding, perhaps a mitigation or departure with which the state may disagree."

Ibid. There is nothing in the legislative history to suggest that the state could appeal a presumptive sentence in any circumstance.

The purpose of ORS 138.222, as revealed in the legislative history, was to curtail appellate review and reduce the number of appeals. With respect to those cases in which

the trial court imposed a presumptive sentence on a conviction that was placed in the proper grid block, the stated intention was that appellate review would not be available. There was no suggestion that the reason for imposing the presumptive sentence, or the reason for not imposing a different (higher or lower) sentence, would matter.

After examining text, context, and legislative history, we conclude that relator is seeking "review" of Vanzant's sentence, which is a "sentence that is within the presumptive sentence prescribed by" the felony sentencing guidelines. Accordingly, the limitation on appellate review contained in ORS 138.222(2)(a) applies. We therefore turn to the second step of the inquiry: whether ORS 138.222(4)(a) nonetheless permits review of the issues presented.

In State v. Adams, 315 Or. 359, 365-67, 847 P.2d 397 (1993), this court held that "ORS 138.222 (3) and (4) are exceptions only to ORS 138.222(2)(e)" but not to ORS 138.222(2)(a) to (d). (Emphasis added.) The court based that holding primarily on the wording, context, and structure of the statute. Ibid. As we have concluded, relator's petition asks for review of the number of months of incarceration to which Vanzant has been sentenced under the presumptive-sentence portion of the felony sentencing guidelines, which is the precise subject covered by ORS 138.222(2)(a), not an "other" issue covered by ORS 138.222(2)(e). That being so, ORS 138.222(4)(a) is not available.

In response to that line of reasoning, defendant argues, first, that a criminal defendant could challenge on direct appeal a decision to impose a Measure 11 sentence as being unconstitutional. For example, had defendant imposed a 75-month sentence instead of a 70-month sentence, he asserts, Vanzant could have appealed and had his constitutional claims reviewed. That proposition is correct, because such a sentence is not a presumptive sentence as to which ORS 138.222(2)(a)

precludes appellate review. However, that proposition does not demonstrate that appellate review is available when a court imposes a lesser, presumptive sentence. The fact that a statute may grant a comparative advantage to criminal defendants does not detract from the statute's clear meaning.

Defendant next points out that the state filed a notice of appeal in State v. Vanzant. That is so, but a litigant's prudence proves nothing about the meaning of the statutes governing appellate review.

Finally, defendant contends that Adams does not apply, because the criminal defendant in Adams had stipulated to a departure sentence, whereas "Vanzant stipulated to nothing." (Boldface deleted.) Defendant misses the key point of Adams. It is true that Adams concerned unreviewability under ORS 138.222(2)(d), governing stipulated sentences, while the present case concerns unreviewability under ORS 138.222(2)(a), governing presumptive sentences. Nonetheless, the central underpinning of this court's holding in Adams was that the exceptions found in subsections (3) and (4) of ORS 138.122 "are exceptions only to ORS 138.222(2)(e)" but not to the enumerated situations found in ORS 138.222(2)(a) to (d). Adams, 315 Or. at 365-67. When this court interprets a statute, that interpretation becomes a part of the statute as if written therein. State v. King, 316 Or. 437, 445, 852 P.2d 190 (1993).[7] That principle applies even when the statute operates in a new factual setting.

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[7] There are sound prudential reasons for following the principle stated in the text. Among them are a need for stability and certainty in the understanding of statutes and a respect for the interplay between the roles of the legislative and judicial branches of government in the context of statutory interpretation.

In summary, relator has no plain, speedy, and ade remedy in the ordinary course of the law. We exercise ou discretion to proceed in mandamus.

II. STATE CONSTITUTIONAL CLAIMS

We first address state constitutional claims. See S v. Charboneau, 323 Or. 38, 53, 913 P.2d 308 (1996) (cou addresses state constitutional claims before addressing fed constitutional claims). Vanzant asserts that Measure 11 violates the equal privileges and immunities clause of Arti section 20, of the Oregon Constitution; the right of allocu under Article I, section 11; the reformation clause of Art I, section 15; and the separation-of-powers principles set in Article III, section 1, and Article VII (Amended), secti

A. Equal Privileges and Immunities

Article I, section 20, provides:

> "No law shall be passed granting to any cit or class of citizens privileges, or immunities, whic upon the same terms, shall not equally belong to a citizens."

Vanzant argues:

> "Measure 11 creates two subclasses: offen whose Measure 11 minimums are greater than thei presumptive maximum guidelines sentences, and offenders whose Measure 11 minimums are less th their presumptive maximums. Trial courts cannot mitigate the sentences of members of the former subclass, but they can mitigate (at least to a degree sentences of members of the latter class. Measure disfavors members of the former class, and there is nothing those members can do to gain entry into th

> favored class. The measure thereby violates the disfavored members' rights of equal privileges and immunities."

The groups to which Vanzant alludes do not comprise "class[es] of citizens" within the meaning of Article I, section 20. In State v. Clark, 291 Or. 231, 630 P.2d 810, cert. den. 454 U.S. 1084 (1981), this court discussed the meaning of the constitutional phrase "class of citizens" in Article I, section 20:

> "The terms 'class' and 'classification' are invoked sometimes to mean whatever distinction is created by the challenged law itself * * *. [E]very law itself can be said to 'classify' what it covers from what it excludes. For instance, the rule of this court that limits the time for filing a petition for review (Rule 10.05) 'classifies' persons by offering the 'privilege' of review to those who file within 30 days and denying it to those who file later. Similarly, a law that licenses opticians and optometrists to perform different functions does not grant or deny privileges to classes of persons whose characteristics are those of 'opticians' and 'optometrists'; rather, the law creates these classes by the licensing scheme itself. Attacks on such laws as 'class legislation' therefore tend to be circular and * * * have generally been rejected whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms." 291 Or. at 240-41 (citation omitted).

Laws involving classifications created by statute "are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I, section 20." Sealey v. Hicks, 309 Or. 387, 397, 788 P.2d 435, cert. den. 498 U.S. 819 (1990).

Measure 11 is a law that involves classifications created by statute. Indeed, Vanzant acknowledges that persons subject to sentencing under Measure 11 "are not members of a 'true class,' for Article I, section 20 [,] purposes."

Measure 11 mandates the same minimum sentence for everyone who commits a particular crime. The fact that some such persons have committed crimes in the past that place them in a position under the felony sentencing guidelines that is less favorable than the position that they occupy under Measure 11 does not create "classes" for Article I, section 20, purposes.[8] A criminal defendant is responsible not only for having committed the crime that calls Measure 11 into play, but also for having accumulated a prior criminal history. In other words, every person had the opportunity to remain in the allegedly favored class by obeying the law. Thus, the classification on which Vanzant relies is not based on factors beyond the criminal defendant's control. Neither is that classification based on an immutable characteristic, such as race.

We conclude that the challenge under Article I, section 20, is not well taken.

B. Allocution

Article I, section 11, of the Oregon Constitution, states in part that, "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." That

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[8] See Moore v. Missouri, 159 U.S. 673, 678, 16 S.Ct. 179, 181, 40 L.Ed. 301 (1895) (under the federal Equal Protection Clause, "the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence against the law, and * * * a different punishment for the same offence may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated" (citations omitted)).

right includes the right to speak at sentencing, that is, the right of allocution. DeAngelo v. Schiedler, 306 Or. 91, 94-96, 757 P.2d 1355 (1988). Vanzant argues:

> "[The right of allocution] requires that at sentencing, defendants be given a meaningful way to seek mitigation of their sentences. However, a defendant such as Vanzant, whose Measure 11 minimum is greater than his presumptive maximum guidelines sentence, has no meaningful way to seek mitigation. The measure violates his right of allocution."

Vanzant misunderstands the nature and extent of the right of allocution. That right does not carry with it a right to have the sentencing court necessarily be able to reduce a sentence that otherwise applies. Rather, in DeAngelo, this court noted that the right "should logically include the right to make any statements relevant to existing sentencing and parole practices." 306 Or. at 95 (emphasis added). That is not the same as a right to alter or to abate existing sentencing practices.[9]

Vanzant also is wrong to suggest that the right of allocution is meaningless for a person being sentenced under ORS 137.700. First, that statute prescribes imposition of a minimum sentence for certain felonies. Thus, a trial court

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[9] See Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv L Rev 821, 832-33 (1968) ("since the common law judge generally had no discretion as to the quantum of punishment in felony cases, the point of [allocution] was not to elicit mitigating evidence or a plea for leniency, but to give the defendant a formal opportunity to present one of the strictly defined legal reasons which required the avoidance or delay of sentencing: he was not the person convicted, he had benefit of clergy or a pardon, he was insane, or if a woman, she was pregnant" (footnotes omitted)).

could impose an even longer sentence than the minimum.[10] The right of allocution gives a defendant an opportunity to attempt to convince the sentencing court to impose no more than the minimum, as well as to address other sentencing matters that may be involved, such as the imposition of a fine.

Second, the present case involves only a facial challenge to ORS 137.700. During allocution a defendant may argue that the mandatory minimum, as applied to the particular crime, would be unconstitutionally cruel and unusual or disproportionate.[11] That, too, is a meaningful use of allocution that remains available under ORS 137.700.

In summary, the challenge, under Article I, section 11, is not well taken.

C. Reformation

At the time of the underlying crime, Article I, section 15, of the Oregon Constitution, provided:

> "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."[12]

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[10] As previously stated, ORS 137.700(1) provides that "[t]he court may impose a greater sentence if otherwise permitted by law." The felony sentencing guidelines permit upward departures in some circumstances, and the sentencing court also may impose consecutive sentences under ORS 137.123.

[11] Vanzant did not make either claim in the underlying case.

[12] At the election of November 5, 1996, the people amended Article I, section 15, of the Oregon Constitution, by adopting Measure 26 (1996). Because of our disposition of this case, we need not and do not consider any question related to Measure 26.

Vanzant argues that the foregoing provision

> "requires that either the judiciary or the executive have the authority to structure sentences in accordance with an offender's reformation. Measure 11-- a statute--prohibits such structuring (indeed, it does not even allow the executive to give offenders time off for good behavior). Measure 11 thereby violates Article I, section 15."

As noted above, ORS 137.700 establishes minimum terms of imprisonment for convictions of specific felonies. More than 30 years ago, this court rejected an Article I, section 15, challenge to a similar statute. In Tuel v. Gladden, 234 Or. 1, 3, 379 P.2d 553 (1963), the convicted person had been sentenced to life in prison, under a habitual-offender statute. This court held that the sentence mandated by that statute did not violate Article I, section 15, reasoning:

> "The Oregon Constitution does not attempt to state all of the principles to be followed by the legislature in enacting sentencing laws. The constitution does contain sentencing restrictions in addition to the above quoted [reformation clause]. It requires that 'all penalties shall be proportioned to the offenses'; excessive fines shall not be imposed; and cruel and unusual punishments shall not be inflicted. Art. I, s 16. The drafters of the constitution, however, did not include the most important consideration of all, the protection and safety of the people of the state. Such a principle does not have to be expressed in the constitution as it is the reason for criminal law. All jurisdictions recognize its overriding importance.
>
> "We interpret Art I, s 15, of the Oregon Bill of Rights to command and require that Oregon sentencing laws have as their object reformation and not

> retaliation, but they do not require that reformation be sought at substantial risk to the people of the state." Id. at 5-6 (footnote omitted).

Vanzant asserts that Tuel is distinguishable, because it involved application of a habitual-offender statute, which by definition took account of a convicted person's criminal history and, implicitly, resistance to reformation. But the rationale of Tuel, quoted above, is more general than Vanzant suggests. Under that rationale, the legislature is entitled to prescribe more serious penalties for crimes that present greater risks to the safety of the people of the state. Nothing in Tuel suggests that the choice of a sentence must differ from criminal to criminal because of Article I, section 15. To the contrary, its very holding supports the imposition of a lengthy mandatory sentence for all persons coming within the ambit of the sentencing statute.

Vanzant's assertions that Article I, section 15, requires that all sentences be capable of individualized "structuring," and that ORS 137.700 violates that provision by not providing it, are not well taken.

D. Separation of Powers

Article III, section 1, of the Oregon Constitution, provides:

> "The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Article VII (Amended), section 1, provides in part:

> "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law."

Vanzant makes four separate points, which we will consider in turn.

First, he argues:

> "a. To the extent Measure 11 minimums prohibit mitigation, it encroaches on the judicial function of preserving offenders' constitutional rights against cruel and unusual punishments, and of allocution and reformation."

We have discussed the issues of allocution and reformation earlier in this opinion. Additionally, ORS 137.700 does not encroach on the judicial ability to protect a convicted person's constitutional right to be free from cruel and unusual punishment. As explained above, if a sentencing court rules that a statutorily prescribed sentence (under ORS 137.700 or any other statute) would be unconstitutionally cruel and unusual as applied in a given case, the court may refuse to impose the prescribed sentence. Nothing in ORS 137.700 interferes with the performance of that judicial function. Conversely, nothing in the statute requires another branch of government to perform any functions that it was not performing before the enactment of the statute.

Next, Vanzant argues:

> "b. Historically, the power to ascertain appropriate sentences has been shared by the legislative, executive, and judicial branches; thus, the judiciary has an inherent sentencing power. To the extent Measure 11 prohibits mitigation, it reduces sentencing judges to mere scriveners-- functionaries

> who merely pencil in legislatively predetermined sentences. Thus, the measure eviscerates the judiciary's inherent (historically shared) sentencing powers."

The inherent sentencing power of the courts, whatever its precise reach may be, does not go as far as that argument suggests. Determining the range of possible sentences for particular crimes historically has been a legislative, rather than a judicial, function. As this court said in State v. Smith, 128 Or. 515, 524, 273 P. 323 (1929), the "power to declare what punishment may be assessed against those convicted of crime is not a judicial, but a legislative, power."[13]

This court has held that courts have inherent power to structure sentences in certain respects. For example, in State v. Jones, 250 Or. 59, 61, 440 P.2d 371 (1968), this court held that the judiciary had inherent power to decide whether sentences should be served consecutively or concurrently. That proposition does not carry with it, however, a corollary inherent power to negate or disregard statutorily prescribed sentences. To the contrary, this court has held that courts need specific statutory authority to impose a sentence of imprisonment.[14] In Howell v. State of Oregon, 1 Or. 241, 245 (1859), this court held that, when a statute limited solitary confinement to a maximum of 20 days, the court had no power to sentence the defendant to a year of solitary confinement. More recently, in State v. Leathers, 271 Or. 236, 240, 531 P.2d 901 (1975), this court emphasized that,

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[13] A somewhat different principle applies when the punishment is for contempt of court. See State ex rel. Oregon State Bar v. Lenske, 243 Or. 477, 492-93, 405 P.2d 510, 407 P.2d 250 (1965) (legislature may not destroy or unreasonably abridge court's inherent power to punish for contempt), cert. den. 384 U.S. 943 (1966).

[14] But see note 13, above.

> "[w]hen a court acts beyond the bounds of its sentencing authority, it infringes upon the power of the legislature to determine the manner of punishment. A sentence must be in conformity with the governing statute; any non-conforming sentence is void for lack of authority and thus totally without legal effect." (Citations omitted.)

Vanzant's third contention is the following:

> "c. The charge which the district attorney (DA) selects sets the sentence for a Measure 11 offender. Neither the judiciary nor the executive has the authority to review that sentencing selection. Thus, Measure 11 impermissibly delegates plenary sentencing authority to the DA."

ORS 137.700 establishes minimum prison sentences for 18 felonies. Although the statute does decrease the amount of discretion that a judge may exercise in sentencing a person convicted of a covered crime,[15] it does not transfer any of the former discretion to prosecutors. When making a charging decision, a prosecutor always has known what the legislative range of sentencing is and what statutory minimum sentence (if any) applies. ORS 137.700 has done nothing to change that fact, other than to establish some additional statutory minimum sentences for particular crimes. In other words, the prosecutor's charge always has "set" the sentence in the sense that the charge carries with it a specified, legislatively determined punishment. (Indeed, were it otherwise, serious constitutional questions would arise because, unless the prosecutor can know what potential punishment a given charge

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[15] As discussed above, a judge retains discretion to impose more than the minimum and to impose consecutive sentences.

carries, the accused person would not be able to determine it, either.)

Moreover, it is the conviction of a crime--a judicial event--and not the mere charge, that requires imposition of a Measure 11 sentence. It is a judge, not a prosecutor, who imposes it.

Vanzant's fourth and last separation-of-powers argument is this:

> "d. Measure 11 orders the executive not to reduce sentences in any way. However, Article I, section 15 requires the executive to shorten sentences in response [to] offenders' reformation. Thus, the measure impermissibly prescribes duties which conflict with the executive's constitutional powers."

Vanzant appears to be arguing either that Measure 11 is the legislative performance of an executive function or that Measure 11 unduly burdens the exercise of an executive function. Neither variant of the argument is persuasive.

In State ex rel. Frohnmayer v. Oregon State Bar, 307 Or. 304, 310, 767 P.2d 893 (1989), this court held that a violation of Article III, section 1, occurs when "the powers or functions of one governmental branch are performed by a person performing the duties of a different branch." In that case, the court held that application of the public records law to the disciplinary files of the Oregon State Bar did not violate the state constitutional doctrine of separation of powers. The court noted that "the exercise of power constitutionally assigned to one branch will often have a direct impact on another branch of government" and that such an impact does not, itself, violate the constitution. Ibid.

As discussed above, the selection of a range of sentences for the crimes specified in ORS 137.700 is a power constitutionally assigned to the legislative branch. It is not an executive function.

Instead, the function of the executive is to "take care that the Laws be faithfully executed." Or Const, Art V, s 10. Further, as discussed above, Article I, section 15, does not confer on the executive branch the discretion to reduce the length of criminal sentences.

We turn now to the second variant of Vanzant's separation-of-powers argument and consider whether one branch of government has unduly burdened the actions of another. See Rooney v. Kulongoski (Elections Division # 13), 322 Or. 15, 28, 902 P.2d 1143 (1995) (stating issue). The underlying problem that the "undue burden" cases address is "avoid[ing] the potential for coercive influence between governmental departments." Ibid. Measure 11 does not coerce the exercise of executive-branch functions. As previously discussed, Article I, section 15, does not confer on the executive the power to reduce the length of criminal sentences.

In conclusion, none of Vanzant's arguments concerning separation of powers persuades us of an infirmity in ORS 137.700.

III. FEDERAL CONSTITUTIONAL CLAIMS

Because none of the state constitutional challenges succeeds, we turn to the federal constitutional challenges.

A. Guarantee Clause

The first of the federal constitutional claims is that the initiative process by which the voters adopted Measure 11, and

the content of a companion measure, violate the Guarantee Clause of Article IV, section 4, of the United States Constitution.[16] Because we conclude that Vanzant's Guarantee Clause claim is not justiciable, we do not reach the merits of that claim.[17]

Both the United States Supreme Court and this court have held that claims arising under the Guarantee Clause do not present justiciable controversies. See Pacific Telephone Co. v. Oregon, 223 U.S. 118, 149-51, 32 S.Ct. 224, 230-31, 56 L.Ed. 377 (1912) (so holding); Baum v. Newbry et al., 200 Or. 576, 583-85, 267 P.2d 220 (1954) (applying Pacific

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[16] Article IV, section 4, of the United States Constitution, provides in part:

> "The United States shall guarantee to every State in this Union a Republican Form of Government * * *."

[17] On the merits, Vanzant asserts that Measure 11 violates the Guarantee Clause

> "in two interrelated ways.
>
> "a. The measure's history--principally, the proponents' statements in the Voters' Pamphlet--is so replete with inaccuracies that it short-circuited the deliberative process. Rather than mediate majoritarian passion for the measure, the inaccuracies inflamed it. Under the [Guarantee] Clause, such a failure of the deliberative process is fatal.
>
> "b. Measure 11 is affirmative legislation, for it requires the judiciary to impose, and the executive to administer, particular sentences. Owing to the guardian-ward relationship between Measure 10's veto-proof supermajority requirement, and Measure 11's minimum sentences, the legislature cannot readily amend Measure 11, as it can most every other type of statute. Because Measure 11 is affirmative legislation which the legislature cannot amend 'at will,' it violates the [Guarantee] Clause test which this court announced in Kadderly v. Portland [, 44 Or. 118, 74 P. 710, 75 P. 222 (1904)]."

Telephone and so holding). In Pacific Telephone, an Oregon taxpayer challenged an Oregon state tax levied against it, on the theory that that tax, which had been enacted through an initiative petition pursuant to Article IV, section 1 (1902), of the Oregon Constitution, was unconstitutional. The United States Supreme Court described the taxpayer's argument, and the issues before it in that case, this way:

> "[The taxpayer's arguments] are all based upon the single contention that the creation by a State of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of [the Guarantee Clause]. This being the basis of all the contentions, the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character." Pacific Telephone, 223 U.S. at 137.

The Court held that Guarantee Clause challenges were not justiciable. It stated:

> "As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction." Id. at 151.[18]

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[18] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 22 L.Ed. 627 (1874), and In re Duncan, 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219 (1891), which the separate opinion of Durham, J., cites, 324 Or. at 646,

(continued...)

Since its decision in Pacific Telephone, the Supreme Court has not swayed from that holding and has, in fact, repeatedly reiterated it. See, e.g., Kiernan v. Portland, Ore 223 U.S. 151, 163-64, 32 S.Ct. 231, 233-34, 56 L.Ed. 386 (1912) (applying Pacific Telephone and holding that a Guarantee Clause claim presents a nonjusticiable controversy Marshall v. Dye, 231 U.S. 250, 256-57, 34 S.Ct. 92, 93-94 58 L.Ed. 206 (1913) (the plaintiffs' Guarantee Clause claim "presents no justiciable controversy concerning which the decision is reviewable in this court upon writ of error to the state court"); Davis v. Hildebrant, 241 U.S. 565, 569, 36 S.Ct. 708, 710, 60 L.Ed. 1172 (1916) ("the proposition and the argument [that including the referendum within the state legislative power violates the Guarantee Clause] disregard th settled rule that the question of whether that guarantee of th Constitution has been disregarded presents no justiciable controversy"); Ohio v. Akron Park District, 281 U.S. 74, 79-80, 50 S.Ct. 228, 230-31, 74 L.Ed. 710 (1930) ("it is w settled that the questions arising under [the Guarantee Claus are political, not judicial, in character and thus are for the consideration of the Congress and not the courts"); Highlan Farms Dairy v. Agnew, 300 U.S. 608, 612, 57 S.Ct. 549, 551, 81 L.Ed. 835 (1937) ("the enforcement of [the Guaran Clause], according to the settled doctrine, is for Congress, the courts"); Baker v. Carr, 369 U.S. 186, 224, 82 S.Ct. 6 713-14, 7 L.Ed.2d 663 (1962) ("the Court has consistently held that a challenge to state action based on the [Guarantee Clause presents no justiciable question"); City of Rome v. United States, 446 U.S. 156, 182 n. 17, 100 S.Ct. 1548,

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[18] (...continued)
648-50, predated Pacific Telephone by decades and are less specific to t present issue than is Pacific Telephone. Therefore, Minor and Duncan not binding. The Federalist No. 10 (James Madison) (B.F. Wright ed, 1961), entitled The Size and Variety of the Union as a Check on Factio 324 Or. at 646-49, materials likewise cannot overcome binding Suprem Court precedent.

1564, 64 L.Ed.2d 119 (1980) ("[w]e do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause * * * since that issue is not justiciable").

Because this is a question of federal law, we are bound by the pertinent decisions of the United States Supreme Court. See Barcik v. Kubiaczyk, 321 Or. 174, 183-86, 895 P.2d 765 (1995) (federal standards of justiciability apply to a federal claim under 42 USC § 1983, even when the claim is brought in state court). In Baum, this court applied Pacific Telephone and its progeny and refused to reach the merits of the plaintiff's argument that an amendment to the state constitution violated the Guarantee Clause by improperly delegating legislative powers to the courts and the executive. This court stated:

> "As to the alleged delegation of legislative authority to the secretary of state, it is well settled that it is not within the judicial power to determine whether the republican form of government as guaranteed by the federal constitution is violated because that question is peculiarly a political matter and not one of judicial cognizance.
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> " * * * * *
>
> "We are bound by the interpretation placed on the Federal Constitution by the Supreme Court of the United States. This, therefore, being a political matter and not one for judicial inquiry, we are powerless to determine whether or not the constitutional amendment before us violates article IV, s 4, of the Federal Constitution." Baum, 200 Or. at 584-85.

Vanzant argues that the Supreme Court's cases hold only that Guarantee Clause claims are not justiciable in federal courts. He contends that nothing contained in Pacific Telephone or its progeny precludes state courts from

considering claims brought under the Guarantee Clause. Thus, Vanzant asserts that Baum was wrongly decided.[19] For the

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[19] Vanzant relies on the following passage from this court's opinion in State v. Montez, 309 Or. 564, 603-04, 789 P.2d 1352 (1990):

> "The United States Supreme Court has provided no practical guidance as to what constitutes a 'republican form of government,' because that Court has held that, within the federal government, the enforcement of the guarantee is assigned not to the federal courts but to the political branches. Thus, claims arising under Article IV, section 4, do not present justiciable controversies in federal courts.
>
> "That does not mean that the states may not adjudicate the compatibility of state law with the guarantee clause. This court addressed that issue with regard to Oregon's initiative system in Kadderly v. Portland, 44 Or. 118, 144-45, 74 P. 710, 75 P. 222 (1903) (initiative and referendum does not abolish or destroy the republican form of government, or substitute another in its place). See Kiernan v. Portland, 57 Or. 454, 469-80, 111 P. 379, 112 P. 402 (1910); Oregon v. Pacific States Tel. & Tel. Co., 53 Or. 162, 166, 99 P. 427 (1909)." (Emphasis added; citation omitted; footnote omitted.)

Vanzant's reliance on that passage in Montez is misplaced for three reasons. First, that statement is dictum, because it was not necessary to the outcome of the case. Second, that passage is not a complete assessment of the state of the law at that time. In Montez, the court cited Kadderly, Kiernan, and this court's decision in Pacific Telephone to support its statement that Guarantee Clause claims might be justiciable in this court. All those cases were decided before the Supreme Court declared, in Pacific Telephone, that Guarantee Clause claims were not justiciable. In Montez, the court failed to cite or acknowledge the holding in Baum, the only case from this court issued after the Supreme Court's decision in Pacific Telephone, which is directly on point. The third reason why defendant's reliance on Montez is misplaced is that, if the United States Supreme Court has held squarely that Guarantee Clause claims are not justiciable in state and federal courts, then we lack the authority to determine that such claims are justiciable in state courts. See Oregon v. Hass, 420 U.S. 714, 719 n. 4, 95 S.Ct. 1215, 1219 n. 4, 43 L.Ed.2d 570 (1975) (state courts may not interpret a provision of the federal constitution to give individuals more rights than have been given

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following three reasons, we disagree.

First, in Pacific Telephone, the Supreme Court did not distinguish between state and federal courts when it held that Guarantee Clause claims were not justiciable. The Court framed the question before it as "whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character." 223 U.S. at 137 (emphasis added). See also id. at 133 (stating that the issue in the case is "whether it is the duty of the courts or the province of Congress to determine when a State has ceased to be republican in form and to enforce the guarantee of the Constitution on that subject" (emphasis added)). The Court specifically held that the Guarantee Clause issues presented in Pacific Telephone, "in their very essence, are * * * definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power." Id. at 151 (emphasis added). That holding is written broadly and is not limited, by its wording, to federal courts. Moreover, the Court's conclusion that the issue presented in Pacific Telephone is one "exclusively committed to Congress" forecloses the argument that the issue is one that also may be considered by state courts; if the question is one exclusively committed to Congress' judgment, then it is not a proper subject for either state or federal courts.

The second reason why we disagree with Vanzant's argument that Guarantee Clause claims are justiciable in state courts, although not in federal courts, is that the United States Supreme Court has twice affirmed state supreme court decisions that have held that Guarantee Clause claims do not

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[19] (...continued)
under an interpretation of the same provision by the United States Supreme Court). We read the Supreme Court's pertinent cases as so holding.

present justiciable controversies in state courts. In State v. Mountain Timber Co., 75 Wash. 581, 590, 135 P. 645, 649 (1913), aff'd 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917), the Washington Supreme Court refused to consider a Guarantee Clause challenge to a state insurance law reasoning: "The contention that the Industrial Insurance Law is in violation of the guarantee of a republican form of government needs no discussion. It is disposed of by reference to the late cases. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 32 Sup.Ct. 224, 56 L.Ed. 377; Kiernan v. Portland, 223 U.S. 151, 32 S.Ct. 231, 56 L.Ed. 386." The Washington court relied on the Supreme Court's holdings in Pacific Telephone and Kiernan--that Guarantee Clause claims were nonjusticiable--to dispose of the Guarantee Clause claim before it. Mountain Timber was appealed to the Supreme Court, which similarly concluded that the Guarantee Clause claims raised in that case were nonjusticiable, citing both Pacific Telephone and Kiernan. Mountain Timber, 243 U.S. at 234-35. Accordingly, that Court affirmed the judgment of the Washington Supreme Court, id. at 246, including the part of its opinion that concluded that Guarantee Clause claims are not justiciable in state courts.

Similarly, in Borden v. Louisiana State Board of Education, 168 La. 1005, 1023, 123 So. 655, 661 (1928), the Louisiana Supreme Court relied on Pacific Telephone to conclude that a Guarantee Clause claim brought in that case presented a "question [that] is a political one, which does not fall within the jurisdiction of the courts." Therefore, the Louisiana court refused to consider the merits of that claim. The Louisiana court relied on Borden when it issued its decision in Cochran v. Louisiana State Board of Education, 168 La. 1030, 1032-33, 123 So. 664 (1928), aff'd 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930). The United States Supreme Court affirmed the Cochran decision. Cochran, 281 U.S. at 375. In doing so, it acknowledged that the Louisiana court's decision in Borden was the basis for Cochran. Id. at

374, 50 S.Ct. at 335. Accordingly, when the Supreme Court stated, in Cochran, that Guarantee Clause claims present nonjusticiable controversies and affirmed the judgment of the Louisiana court, ibid., the Court affirmed the Louisiana court's holding that Guarantee Clause claims are not justiciable in state courts.

The third reason why we disagree with Vanzant's argument that Guarantee Clause claims are justiciable in state courts, even though they are not justiciable in federal courts, is that such a conclusion would run afoul of the principle that the Supreme Court is the final arbiter of the federal constitution and that it sits, in part, to ensure that the state courts interpret federal law uniformly. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348, 4 L.Ed. 97 (1816) ("Judges of equal learning and integrity, in different states, might differently interpret * * * the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, * * * the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; * * * and the appellate jurisdiction must continue to be the only adequate remedy for such evils."). Under Vanzant's construct, each state would be free to interpret the Guarantee Clause in a different way, but the Supreme Court would be without power to ensure the uniform interpretation of that provision of the federal constitution. See also Oregon v. Hass, 420 U.S. 714, 719 n. 4, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) (state courts may not interpret a provision of the federal constitution to give individuals more

rights than have been given under an interpretation of the same provision by the United States Supreme Court).

Vanzant points to numerous law review articles to support his assertion that Guarantee Clause claims are justiciable in state courts, notwithstanding Pacific Telephone and Baum. For the reasons that follow, we are not persuaded by those articles.

First, many of the commentators who have written on the justiciability of Guarantee Clause claims argue only that such claims should be justiciable, not that they are justiciable.[20] While that certainly is a valid exercise for a scholar, this court is not free to reject binding precedent from the United States Supreme Court on a question of federal law.

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[20] See Cynthia L. Fountaine, Note, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S Cal L Rev 733, 761 (1988) (so arguing); Douglas H. Hsiao, Note, Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic, 41 Duke LJ 1267, 1291-96 (1992) (same).

Other commentators assume, without detailed analysis, that state courts may decide Guarantee Clause claims.[21] The absence of analysis makes those commentators unpersuasive.

The commentators who do consider the question in detail and who conclude that Guarantee Clause claims are justiciable in state courts base their conclusion on the theory that the United States Supreme Court does not impose its federal constitutional justiciability requirements on state courts, even when state courts address federal questions.[22] Those

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[21] See Jesse H. Choper, Observations on the Guarantee Clause--As Thoughtfully Addressed by Justice Linde and Professor Eule, 65 U Colo L Rev 741, 743 (1994) (accepting, without discussing, that Guarantee Clause claims are justiciable in state courts); Hans A. Linde, Who is Responsible for Republican Government?, 65 U Colo L Rev 709, 714 (1994) (concluding, in a paragraph, that the Supreme Court's decision in Pacific Telephone does not preclude state courts from considering Guarantee Clause claims); Thomas C. Berg, Comment, The Guarantee of Republican Government: Proposals for Judicial Review, 54 U Chi L Rev 208, 225 (1987) (concluding, in a sentence, that Guarantee Clause claims are justiciable in state courts); Debra F. Salz, Note, Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court, 62 Geo Wash L Rev 100, 112 (1993) (same); Arthur E. Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn L Rev 513, 554 n 180 (1962) (stating that, even if Pacific Telephone bars federal courts from enforcing the Guarantee Clause, it does not prohibit state courts from doing so, because the Supreme Court does not control state court jurisdiction); Laurence H. Tribe, American Constitutional Law § 5-23, at 398 (2d ed 1988) (noting that, although the Guarantee Clause does not protect individuals, it may confer "judicially enforceable rights upon states as states" (emphasis in original)).

[22] See Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U Colo L Rev 849, 873-74 (1994) (so arguing); Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum L Rev 1, 70-78 (1988) (same); Edward A. Stelzer, Bearing the Judicial Mantel: State Court Enforcement of the Guarantee Clause, 68 NYU L Rev 870, 895-900 (1993) (same); Hans A.

(continued...)

commentators do not, however, address the impact of the Supreme Court's holdings in Cochran or Mountain Timber, nor do they adequately distinguish the Supreme Court's broad pronouncement in Pacific Telephone, 223 U.S. at 137, that Guarantee Clause claims of the type raised here are "exclusively committed to Congress." In the light of our foregoing discussion, we do not find the arguments of the commentators convincing.

Finally, Vanzant also argues that, even assuming that the Supreme Court's cases have held that Guarantee Clause claims are not justiciable in state courts, recent statements from that Court suggest a retreat from that position. In support of his argument, he points to a passage in New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

In New York, the Court held that certain provisions of a federal law dealing with the disposal of low-level radioactive waste violated the federal constitution. 505 U.S. at 149. The Court rejected a Guarantee Clause claim raised by the party challenging the statute. Id. at 183-86. The Court stated that it need not decide whether Guarantee Clause claims raise justiciable controversies, because the challenged law in that case could not "reasonably be said to deny any State a

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[22] (...continued)
Linde, When Is Initiative Lawmaking Not "Republican Government"?, 17 Hastings Const LQ 159, 160-63 (1989) (stating that, although the United States Supreme Court's approach "allocates federal responsibility for the guarantee within the branches of the federal government, * * * it does not relieve the states of the obligation to maintain republican forms of government"). Cf. Akhil R. Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 Univ of Colo L Rev 749, 756 & nn 26 & 27 (1994) (criticizing Linde's "anti-direct democracy" approach toward the Guarantee Clause).

republican form of government." Id. at 185. In reaching that conclusion, the Court wrote:

> "[R]ecently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances." Ibid. (citation omitted).

Obviously, that passage means that at some future date, "at least in some circumstances," some Guarantee Clause claims may raise justiciable controversies. However, in New York, the Court did not hold that any Guarantee Clause claim is justiciable. In addition, in New York, the issue arose in the context of whether a state could invoke the Guarantee Clause as a basis for limiting federal intrusion into state autonomy. The Court has shown no inclination to allow individual litigants to rely on the Guarantee Clause to challenge a state action on the basis that that action infringes on federal constitutional rights. We will not fail to follow the applicable holding in Pacific Telephone because of a factually distinguishable dictum contained in New York.

Vanzant's claim under the Guarantee Clause is not justiciable.

B. Equal Protection

Defendant's final argument is that he was right for the right reason: that ORS 137.700 violates the Equal Protection Clause of the United States Constitution. The Fourteenth Amendment provides in part:

> "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." US Const, Amend XIV, § 1.

In deciding this case, defendant ruled that

> "the same identical sentence mandated by the statute may constitute cruel and inhuman punishment in one fact situation and an appropriate sentence in another. * * * If the application as to one defendant is unconstitutional, it would necessarily be unconstitutional to all within the class as a denial of equal protection of the laws."

In this court, defendant further contends:

> "Measure 11 prohibits trial courts from imposing prison sentences of less than the measure's prescribed terms. Because of that, an offender such as defendant Vanzant, whose Measure 11 minimum is greater than the presumptive maximum sentence he would get under the guidelines, has no meaningful way to seek a mitigated sentence."

Based on that premise, defendant asserts that ORS 137.700 is subject to "strict scrutiny"[23] under federal law, for two reasons: First, because the voters adopted Measure 11 at the same time as a companion, Measure 10, which amended the state constitution to change the means by which Measure 11 can be amended in the future; and, second, because Measure 11 violates "fundamental rights against cruel and unusual punishments, and of allocution."

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[23] In Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169 (1966), the Supreme Court held that, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." The Court later explained what "strict scrutiny" entails: The challenged law must be "necessary to promote a compelling state interest." Kramer v. Union School District, 395 U.S. 621, 627, 89 S.Ct. 1886, 1889-90, 23 L.Ed.2d 583 (1969).

Measure 10 (1994) enacted Article IV, section 33, of the Oregon Constitution. It provides in part that "a two-thirds vote of all the members elected to each house shall be necessary to pass a bill that reduces a criminal sentence approved by the people."

Whatever the meaning or merits of Measure 10, it is not at issue in this proceeding. Measure 10 and Measure 11 operate independently. Neither was dependent on the other for enactment.

We conclude, therefore, that the existence of Measure 10 does not require strict scrutiny of Measure 11. We need not and do not decide whether Measure 10 itself would be subject to strict scrutiny.

Defendant's second argument for strict scrutiny rests on the assertion that convicted persons have a "fundamental right" to be free from the infliction of cruel and unusual punishment and to allocute. With respect to cruel and unusual punishment, the pertinent precedent is Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). In that case, the Court rejected an argument that a provision of the federal sentencing guidelines, providing for mandatory minimum sentences for drug crimes, should be subjected to strict scrutiny because the statute implicated fundamental rights. 500 U.S. at 464-65. The Court instead utilized a "rational basis" test and upheld the statute. Id. at 465.

With respect to the assertion that the federal right of allocution is a "fundamental right" that calls for strict scrutiny, we have explained, earlier in this opinion, why ORS 137.700

does not infringe the right of allocution.[24] Because the statute does not infringe the right of allocution, the purportedly "fundamental" nature of that right does not affect the Equal Protection analysis.

We conclude that the applicable federal law calls for use of the rational-basis test. Defendant argues in the alternative that ORS 137.700 does not survive the rational-basis test:

> "[T]he measure purports to serve four purposes: incapacitation, deterrence, sentence predictability, and sentence comparability. The first two purposes are legitimate, but the measure is not rationally related to them. The latter two purposes are illegitimate. The measure does not bear a rational relation to some legitimate end. Defendant judge correctly ruled that it violates equal protection."

Defendant's first assertion plainly is incorrect. An imprisoned felon is incapacitated from committing further crimes in society at large during the term of incarceration.

With respect to the second assertion, defendant cites many sources for the proposition that imprisonment is an ineffective deterrent. His policy point may be debatable, but it is legislatively debatable, and the people (acting in their

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[24] See generally Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962). There, the Court held that the failure to allow an opportunity for allocution was not cognizable in habeas corpus, because "[i]t is an error which is neither jurisdictional nor constitutional." (Emphasis added.) The Supreme Court left open the question whether a refusal to permit allocution upon request would entitle a petitioner to habeas corpus relief. Id. at 429. But the mere absence of an opportunity for allocution was not of constitutional magnitude, as the absence of a "fundamental" right would be.

legislative role) have chosen against him. Moreover, his argument proves too much. If ORS 137.700 is not rationally related to the goal of deterrence simply because prison does not work, then no statute prescribing incarceration would survive even the rational-basis test.

Defendant also asserts that a "non-selective" incarceration system is even less effective in controlling crime than is a more individualized system. However, under the rational-basis test, a statute need not "employ the least restrictive, or even the most effective or wisest, means to achieve its legitimate ends." Jones v. Helms, 452 U.S. 412, 425-26, 101 S.Ct. 2434, 2443-44, 69 L.Ed.2d 118 (1981).

The third argument is that predictability in sentencing cannot be a legitimate end of this statute, because ORS 137.700 arbitrarily selects only certain felonies for mandatory minimum sentences. The statute is, however, directed toward violent offenses. Each covered crime involves either the unlawful use of force against a person or a serious sexual assault on a child who is incapable of consenting. Even if the statute is "underinclusive," because it does not list all violent felonies, the Supreme Court ordinarily does not strike down criminal laws on that ground under the rational-basis test used for Equal Protection analysis. Id. at 426.

Defendant's fourth point is that the goal of achieving comparable sentences for those who commit comparable crimes is not a legitimate end. He contends that the law thereby disadvantages judges who would prefer to impose lesser sentences. But ORS 137.700 classifies, and singles out for specified treatment, certain convicted felons, not certain judges. It is the classification among convicted persons that must be examined.

As to that classification, laws subject to rational-basis scrutiny will be upheld "so long as [the classification] bears a

rational relation to some legitimate end." Romer v. Evans U.S. ___, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996). law may be so overinclusive or underinclusive that no ratio relationship can be detected. 116 S.Ct. at 1627-28. That not the situation here. ORS 137.700 prescribes mandatory minimum sentences for most violent felonies committed ag people. In view of the penalties already prescribed by law other violent felonies, the selection reflected in ORS 137.7 is rationally related to a legitimate end.

Finally, we note that the Equal Protection Clause d not prevent a state from increasing the punishment actually imposed for a particular crime. For example, in Dobbert v Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (19 the defendant, who had killed his children, was sentenced t death under a Florida statute that was enacted in 1972 and later was held to be constitutional. An earlier version of th statute had been held to be unconstitutional. As a result, th sentences of all those sentenced to death under the former statute were commuted to life imprisonment. 432 U.S. at 3 The Supreme Court held, among other things, that the imposition of a death sentence on the defendant did not den him equal protection merely because all convicted persons had been sentenced to death under the old statute had been resentenced to life imprisonment. Ibid.

We conclude that ORS 137.700 survives defendant' Equal Protection challenge.

IV. CONCLUSION

None of the facial constitutional challenges mounted this case is well taken. For that reason, defendant erred as matter of law when he refused to apply ORS 137.700 when sentencing Vanzant. We direct the issuance of a peremptor writ of mandamus, requiring defendant to enter a corrected judgment in State v. Bobby Ron Vanzant, Jackson County

Case No. 952538CC2, that imposes sentence for the crime of second-degree manslaughter in accordance with ORS 137.700(2)(e).

Peremptory writ to issue.

DURHAM, Justice, concurring in part and dissenting in part.

I agree with the majority that, in this case, mandamus is an appropriate procedural mechanism for obtaining judicial review of relator's (and, necessarily, the state's) claims of error regarding the sentencing of Vanzant. Relator has no plainly available remedy in the ordinary course of law but not for the reason relied on by the majority. In response to the parties' arguments on the merits, the majority refuses to address Vanzant's claim under the Guarantee Clause of Article IV, section 4, of the United States Constitution, asserting that that claim is "not justiciable." 324 Or. at 618. For the reasons discussed below, I believe that the majority's determination regarding justiciability is flawed. Accordingly, I dissent from that portion of the majority's opinion.

1. Mandamus is an Available Remedy.

ORS 34.110 provides:

> "A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but though the writ may require such court, corporation, board, officer or person to exercise judgment, or proceed to the discharge of any functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a plain, speedy

and adequate remedy in the ordinary course of the law." (Emphasis added.)

Relator contends that defendant judge erred in sentencing Vanzant. Relator claims that defendant judge should have sentenced Vanzant under Ballot Measure 11, ORS 137.700(2)(e), and should not have entered a presumptive sentence pursuant to the rules of the Oregon Criminal Justice Commission, ORS 137.637. Defendant judge decided that a presumptive sentence was appropriate because Ballot Measure 11, ORS 137.700(2)(e), was unconstitutional. 324 Or. at 600-01. The question that arises is whether relator's remedy for that ruling by way of an appeal under ORS 138.060 and 138.222 is a "plain, speedy and adequate remedy" under ORS 34.110.

The majority answers that question by holding that the state has no right under ORS 138.222 to obtain appellate review of defendant judge's ruling that Ballot Measure 11 is unconstitutional. I doubt that the legislature intended to deny the state the ability to obtain appellate review of an issue of that kind. However, it is unnecessary to decide finally in this case that the state has no right to appeal that issue. Sufficient doubt surrounds the question of the reviewability of that constitutional issue that an appeal is not a legal remedy that is plainly available to relator. As a consequence, ORS 34.110 imposes no barrier to consideration of relator's claim through a writ of mandamus.

Set forth below are the reasons why, in my view, ORS 138.222 does not plainly bar appellate review of the trial court's constitutional ruling. ORS 138.222 authorizes an appellate court to review certain issues on appeal and imposes limitations on such review. It provides in part:

"(2) On appeal from a judgment of conviction entered for a felony committed on or after November 1, 1989, the appellate court shall not review:

"(a) Any sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission.

"(b) A sentence of probation when the rules of the Oregon Criminal Justice Commission prescribe a presumptive sentence of imprisonment but allow a sentence of probation without departure.

"(c) A sentence of imprisonment when the rules of the Oregon Criminal Justice Commission prescribe a presumptive sentence of imprisonment but allow a sentence of probation without departure.

"(d) Any sentence resulting from a stipulated sentencing agreement between the state and the defendant which the sentencing court approves on the record.

"(e) Except as authorized in subsections (3) and (4) of this section, any other issue related to sentencing.

"(3) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure from the sentence prescribed by the rules of the Oregon Criminal Justice Commission:

"(a) Are supported by the evidence in the record; and

"(b) Constitute substantial and compelling reasons for departure.

"(4) In any appeal, the appellate court may review a claim that:

"(a) The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence[.]"

The first question is whether, by appealing, the state, represented here by relator, would seek "review" of a "sentence." In one sense, the answer is yes. Relator argues that, due to the defendant judge's error, Vanzant received a sentence of 20 months but should have received a minimum sentence of 75 months under Ballot Measure 11. However, contrary to the majority's view, that answer is not obvious. Seen differently, relator's claim also can be viewed as an attack on defendant judge's preliminary ruling that Ballot Measure 11 is unconstitutional and, for that reason, the sentencing scheme or procedure that controls how the ultimate sentencing decision should be made is the sentencing guidelines, not Ballot Measure 11. Under that view, the limitation on seeking "review" of a "sentence" would not prevent the state from claiming on appeal that the trial judge applied the wrong body of law to the sentencing decision. Nothing in the statutory text, context, or legislative history of paragraph (2)(a) cited by the majority supports its assertion that the legislature intended to foreclose the state from seeking review of asserted legal errors surrounding the global issue of the correct statutory scheme that should control sentencing decisions.

I turn to paragraph (4)(a). The text of that statute purports to authorize the appellate court to consider precisely the sort of claim that relator now asserts: that the sentencing court violated a legal requirement--here, Ballot Measure 11--in imposing or failing to impose a sentence. According to that paragraph, the appellate court has that review authority "[i]n any appeal."

The majority contends that no such authority exists because of the statement by the court in State v. Adams, 315 Or. 359, 365, 847 P.2d 397 (1993), that "[t]he wording of the statute clearly demonstrates that ORS 138.222(3) and (4) are exceptions only to ORS 138.222(2)(e)." 324 Or. at 607. For several reasons, I disagree with the majority's reliance on that sentence in Adams to foreclose the state's right to obtain appellate review here.

In Adams, the defendant stipulated to a sentence as part of a plea agreement, and received exactly the sentence--an upward departure sentence--to which he had stipulated. 315 Or. at 363-64. Because he stipulated to his sentence, the defendant never made any objection or claim in the trial court that the court was required to cite substantial and compelling reasons justifying the departure. Id. at 364; see ORS 137.671 (requiring substantial and compelling reasons to justify a departure sentence). Nevertheless, he appealed and argued that the sentencing court violated a legal requirement by failing to cite reasons justifying the departure sentence.

A straightforward answer to that argument is that the defendant could not obtain appellate review of that claim because he had never raised it in the trial court and, in fact, had stipulated to the very judgment that he sought to appeal. The Adams majority took a different approach, choosing instead to interpret ORS 138.222(2)(d). The majority held that that paragraph barred appellate review of any sentence resulting from a stipulated sentencing agreement. 315 Or. at

367. Although Adams reached the correct result, it has no application here.

Adams involved a stipulated sentence, unlike the case here. More importantly, the sentence from Adams quoted above, on which the majority relies, was a statement about the text of ORS 138.222(2)(e), not a conclusion reached after an analysis of "the text, context, and legislative history," as the majority now incorrectly states. 324 Or. at 607, 932 P.2d at 1151-52. The Adams majority examined the available legislative history behind the phrase "any other issue related to sentencing" in ORS 138.222(2)(e) and concluded that it "did not answer definitively the question before us." 315 Or. at 366, 847 P.2d 397.

Despite the lack of definitive legislative history, the Adams majority quoted a statement by Senator Springer. He confirmed that his committee had "'worked * * * to limit the circumstances in which an appeal may be taken,'" and he paraphrased the text of ORS 138.222(2)(d), saying that "'the court will not review those sentences * * * if the sentence is resulting from an agreement between the state and the defendant[.]'" Ibid. That history is equally inconclusive regarding the meaning of ORS 138.222, yet the Adams majority relied on it to assert that the "[d]efendant's proposed reading of ORS 138.222 is not consistent with the purpose of the sentencing guidelines, as revealed in the legislative history." Ibid. That conclusion does not follow from the legislative material on which it is based.

The Adams majority noted that paragraph (2)(a) through (d) each barred appellate review of "any sentence" and that, using different terms, paragraph (e) barred review of "any other issue related to sentencing" except as authorized in subsections (3) and (4). Id. at 365 (emphasis added). The Adams majority acknowledged that "[w]e are not free to ignore the fact that the legislature used different terms in related

portions of the statute," ibid., and then proceeded to examine the statute without regard to those and other significant textual distinctions.

Two observations about Adams are apropos. In regard to its construction of paragraph (d), Adams exhibits a methodology of statutory interpretation that is flawed in several respects. The entire exercise in Adams probably was unnecessary because the defendant failed to preserve any of the issues raised on appeal. In regard to paragraph (e), Adams expressed, in one sentence, a conclusion about the appealability of legal issues related to a stipulated sentencing agreement, but it did so without interpreting the text of ORS 138.222 as a whole, without relying on any helpful legislative history and without estimating how the legislature might have approached the problem had it thought of the question. For that reason, the majority overstates what Adams actually held, as opposed to what Adams said, without analysis, about an isolated phrase in the text.

In my view, significant text in ORS 138.222(2) was not interpreted in Adams. Paragraph (e) is an authorization of appellate review for the types of claims described in subsections (3) and (4). Subsection (3) describes issues that the appellate court "shall" review, and subsection (4) describes issues that the appellate court "may" review in any appeal. Subsections (3) and (4) are not "exceptions" to paragraph (e). Nothing in the statute supports that reading. Rather, subsections (3) and (4) are authorizations for appellate review that subsection (e) excepts from its ban on appellate review of "any other issue related to sentencing." Stated differently, subsections (3) and (4) refer to "other issue[s] related to sentencing" that the statute authorizes the appellate court to review.

The authorization for appellate review in subsection (4), as noted above, is discretionary, not mandatory. Had the

Adams majority addressed the text of that subsection, it would have concluded that the Court of Appeals was permitted, but not required, to review the defendant's claim and that the court could consider the defendant's failure to preserve any issue in deciding whether to review his claim on appeal. Considering that procedural problem, I doubt that any appellate court would allow discretionary appellate review of unpreserved claims regarding a stipulated sentence.

The same cannot be said regarding the state's legal issue here. From the outset of litigation regarding Vanzant's sentence, the state has contended that Ballot Measure 11 is lawful in all respects and that Ballot Measure 11, not the sentencing guidelines, dictates Vanzant's sentence. In the words of ORS 138.222(2)(e), the constitutionality of Ballot Measure 11 is an "other issue related to sentencing" for which discretionary appellate review authority exists under ORS 138.222(4)(a). Adams appears not to foreclose the possibility of an appeal by the state on that issue. For present purposes, all that this court needs to say is that genuine uncertainty regarding the state's appellate remedies for defendant judge's constitutional ruling justified plaintiff in filing a petition for a writ of mandamus.

ORS 34.110 authorizes issuance of a writ of mandamus unless a "plain, speedy and adequate" remedy in the ordinary course of law is available. Webster's Third New Int'l Dictionary (unabridged ed 1993) provides the following relevant definitions of those statutory terms:

> "plain * * *: in a plain manner: without obscurity or ambiguity: CLEARLY, SIMPLY * * *." Id. at 1729.
>
> "speedy * * * 1: rapid in motion: going or able to go quickly: SWIFT * * * 2: marked by swiftness of motion or action: occurring, accomplished, or arrived

> at quickly * * * 3: prompt in action or performance: QUICK * * *." Id. at 2190.
>
> "adequate * * * 2: equal to, proportionate to, or fully sufficient for a specified or implied requirement * * * 3: legally sufficient: such as is lawfully and reasonably sufficient * * *." Id. at 25.

I agree that an appellate remedy is "speedy" and "adequate," within those definitions, to afford the state relief from the trial court's asserted legal error. However, as discussed above, the existence of genuine uncertainty about whether the state legally was entitled to appeal regarding that asserted legal error means that an appeal was not a plainly available remedy in the ordinary course of law.[1]

The majority says that its interpretation in Adams became "a part of the statute as if written therein," citing State v. King, 316 Or. 437, 445, 852 P.2d 190 (1993), and that it is simply applying Adams "in a new factual setting." 324 Or. at 608-09. That reasoning is problematic for two reasons.

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[1] The law of equity observes a similar rule, barring equitable relief where a plain, speedy, and adequate remedy at law is available. See Amer. Life Ins. Co. v. Stewart, 300 U.S. 203, 214, 57 S.Ct. 377, 380, 81 L.Ed. 605 (1937), where the U.S. Supreme Court, in an analogous circumstance, said that an insurer could resort to equity where statements by courts in prior cases created a doubt about whether the insurer could obtain an adequate remedy at law:

> "At least in such warnings there are possibilities of danger which a cautious insurer would not put aside as visionary. 'Where equity can give relief plaintiff ought not be compelled to speculate upon the chance of his obtaining relief at law.' Davis v. Wakelee, 156 US 680, 688[, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895)]. * * * A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient." (Emphasis added.)

First, this case involves a statute, ORS 138.222(2)(a), regarding review of a presumptive sentence, and a legal issue--the state's opportunity to obtain appellate review of a preliminary constitutional ruling by the trial court-- that Adams never addressed. Indeed, Adams left uninterpreted a good deal of the text of ORS 138.222(2) and all of the legislative history that bears on the state's right to appellate review here. Whether the state has a right to obtain appellate review here cannot be brushed aside as a mere factual variation of the claim in Adams.

Second, there is reason to doubt the accuracy of the majority's statement, borrowed from King and other cases, that a prior interpretation by this court becomes a part of the statute as if written into it by the legislature at the time of enactment. See Stephens v. Bohlman, 314 Or. 344, 350 n. 6, 838 P.2d 600 (1992) (stating rule of prior interpretation). This concern is separate from the question whether Adams constitutes a "prior interpretation" of the statute that controls the state's appellate remedies in this context.

My intention is to raise the question of the accuracy of the majority's statement regarding the perpetual effect of this court's prior interpretation of a statute, and not to decide the issue finally, because persuasive responses may support the "prior interpretation" rule cited by the majority. I raise the question because appellate courts on occasion present verbal formulas as "rules" without examining the assumptions that underlie them. Through repetition over time without genuine legal analysis, such formulas can become unsound law. In my view, this court never should be unwilling to reconsider the continuing validity of the premises that support court-made rules when credible questions about them arise.

According to recent scholarship, the rule of prior interpretation appears to have sprung up, without explanation

or statutory authority, in an opinion of this court in 1955[2] that relied inaccurately on two out-of-state sources that, at best, bear little relationship to Oregon law. According to Judge Jack L. Landau, in his article, Some Observations About Statutory Construction In Oregon, 32 Willamette L Rev 1, 18 (1996),

> "[t]he citations can be traced back to a 1955 case, State of Oregon v. Elliott[, 204 Or. 460, 465, 277 P.2d 754 (1954), cert. den. 349 U.S. 929 (1955)], in which the court recited this rule and cited as authority a 1914 Missouri case and an article in American Jurisprudence [50 Am Jur Statutes, § 221 (1994)]. Interestingly, the American Jurisprudence article says: 'The interpretation of a statute by the highest courts of a state by which the statute was enacted, is generally regarded as an integral part of the statute, at least where the meaning of such statute is in issue in a court of another jurisdiction.' That is quite a different point than the one for which the court cited it.
>
> "The important question, however, is not whether the court's rule of prior construction can be supported by prior authority. In fact, the rule is rooted fairly firmly in the formalist traditions of nineteenth-century 'vested rights' jurisprudence. The more important inquiry is whether the rule makes sense.

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[2] The decision in question, State of Oregon v. Elliott, 204 Or. 460, 277 P.2d 754 (1954), was handed down by this court in December 1954. This court denied reconsideration without opinion in January 1955, and the United States Supreme Court denied a petition for certiorari in May 1955. The Oregon Reports, following the prevailing practice in that era, identified the case's year of decision as 1955 because that is the year in which the last decision occurred in any appellate court. The accurate year of decision in the case is 1954.

"Beyond bare references to prior cases, the supreme court has never explained the basis for the rule that its construction of statutes becomes part of the statutes themselves. The rule appears predicated on the fiction of legislative acquiescence. According to that notion, once the court interprets a statute, the legislature is put on constructive notice of the court's interpretation, and if the legislature fails to 'correct' that interpretation by subsequent enactment, the court may assume that the legislature acquiesces in the court's interpretation.

"This reasoning has at least two problems. First, it simply does not accord with reality. Legislatures may or may not be aware of the court's interpretations of statutes, particularly in a state such as Oregon, where a legislative assembly of ordinary citizens meets for approximately six months out of every twenty-four. It is unlikely that every legislator subscribes to the Oregon Reports and keeps abreast of the supreme court's interpretations of the legislature's handiwork. Moreover, even assuming that legislators know what the supreme court is saying about their enactments, the legislature may not respond to the court's statutory construction cases for any number of reasons, none of which has anything to do with acquiescence in the court's interpretations.

" * * * * *

"Aside from the fact that the court's rule of prior construction lacks any real explanatory foundation, there is at least one significant problem in its application: If the court's construction becomes part of the statute, the court lacks authority to overrule its own decision. Thus, if the court mistakenly construes a statutory provision--whether because certain

> arguments were not considered or made to the court at the time, or related statutes were not brought to its attention, or relevant legislative history was not before it--there is nothing anyone but the legislature can do about it." (Footnotes omitted; emphasis in original.)

Judge Landau's last criticism of the rule raises another concern of mine. The rule of prior interpretation purports to announce a shorthand version of the well-established rule of stare decisis, at least with respect to statutory interpretations. See State v. White, 303 Or. 333, 348, 736 P.2d 552 (1987) (treating the rule of prior interpretation as an application, in the context of statutory interpretation, of the doctrine of stare decisis).

I accept and support the doctrine of stare decisis as adopted by this court. I believe, however, that the evolution of the rule of prior interpretation in this court's opinions has introduced a degree of inflexibility to our jurisprudence of statutory interpretation that is unfaithful to the doctrine of stare decisis.

Safeway Stores v. State Bd. Agriculture, 198 Or. 43, 255 P.2d 564 (1953), is helpful to this discussion because it accurately presents this court's doctrine of stare decisis and relies on the adaptability inherent in that doctrine in overturning an earlier interpretation of a statute by this court. The court explained the doctrine of stare decisis in these terms:

> "'The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong be the result. Accordingly, unless a

> doctrine or principle has become so well established that it may fairly be considered to have become a rule of property, * * * the courts will not adhere to it, although established by previous decisions, if they are convinced that it is erroneous, even though it may have been reasserted and acquiesced in for a number of years, especially if the former decisions are injurious or unjust in their operation.' [21 CJS 322, Courts § 193.]

"State v. Mellenberger, 163 Or 233, 95 P2d 709, 128 ALR 1506, a criminal case, in departing from a precedent, quoted the following from Dr. Roscoe Pound:

> "'In the epigrammatic phrase of Mr. Justice Holmes, historical continuity is not a duty, it is only a necessity. It is not that we ought to hew to what our forbears have done in the past as a matter of duty. But we find ourselves starting where they left off, building upon what they did and using the materials they left to us. In law we have to perceive how and why legal institutions arose, and to what ends, and with newer and better perceived and better understood ends, to adapt the institutions and materials which have come down to us to the tasks of social control in the time and place. Our materials are experience by reason and testing reason by experience. "Every generation," says Sir Frederick Pollock, "takes up from its fathers, if it is worthy of them, a new starting point of imagination and aptitude, and the strange conservatism of the imaginative faculty is a sure warrant of continuity.'"

"After that quotation, the Mellenberger decision took the following from an essay by Daniel H. Chamberlain:

> "'A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where "the very point" is again in controversy; but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible.'" 198 Or. at 80-81.

In Safeway Stores, the issue was whether a state agency possessed authority under an Oregon statute to deny a milk processing and distribution license for a reason other than those specified in the Oregon statute, known as the Milk Marketing Act. Id. at 64. The plaintiff contended that the statute confined the state agency to the grounds for denial stated in the statute. Id. at 52. The defendant contended, among other things, that the statutory list of grounds for denial was not exclusive, that his statutory authority to deny a license permitted him to rely on non- statutory criteria, such as the adequacy of milk distribution service in the particular region, and that this court had adopted an interpretation of the statute that supported the defendant's position in a recent case, State ex rel. Peterson v. Martin, 180 Or. 459, 176 P.2d 636 (1947). Safeway Stores, 198 Or. at 77.

In Martin, the issue was whether the Milk Marketing Act vested the administrator of the Department of Agriculture with discretion to refuse to issue or to revoke a milk distributor's license in the absence of a violation of a specific statutory ground for revocation. 180 Or. at 467. The court held that the statute afforded the administrator general discretion to deny a license for the reason that existing service was adequate and that the statute did not require, in addition, a specific ground for license revocation. Id. at 473.

The court in Safeway Stores reviewed the statutory analysis conducted just six years earlier in Martin, and concluded that that analysis did "lend countenance" to the defendant's argument. 198 Or. at 80. However, the court said that those statements were "not within the doctrine of stare decisis" and "are not beyond subsequent re-examination." Ibid. The court, after reviewing the doctrine of stare decisis, concluded that its statements in Martin regarding the administrator's statutory authority were "unsound" and "must be deemed withdrawn." Id. at 82.

The doctrine of stare decisis operates most commonly in regard to proposed modifications of the common law. Safeway Stores illustrates that the doctrine equally is applicable to proposed modifications of prior judicial interpretations of statutes. Moreover, the two central premises of the doctrine of stare decisis--stability and flexibility--continue to serve important roles in this court's case law regarding statutory interpretation notwithstanding the rule of prior interpretation. As Judge Landau demonstrates, this court in Holcomb v. Sunderland, 321 Or. 99, 894 P.2d 457 (1995), sidestepped the rule of prior interpretation when it revisited a statute that it previously had construed, concluded that new facts altered the premises for the prior construction, and adopted a different statutory construction. 32 Willamette L Rev at 20-23. Despite the lack of an intervening alteration of the statute in question, the court changed its statutory construction because the prior

interpretation no longer reflected reality. Holcomb, 321 Or. at 105-06.

Safeway Stores and Holcomb are not isolated examples of this court's willingness to overrule earlier statutory interpretations when it desires to do so. In Carlson v. Blumenstein, 293 Or. 494, 501 n. 5, 651 P.2d 710 (1982), the court overruled two prior decisions[3] that, according to the court, erroneously interpreted ORS 17.055 to create a right to recover attorney fees in some circumstances. The court did not hesitate to overrule those incorrect cases because of the rule of prior interpretation. Yet, the legislature had not altered the text of the statutes that the court had interpreted in those cases. Those inconsistencies in the application of the rule of prior interpretation suggest that the court may cite that "rule" as a convenient reason to adhere to prior interpretation when the court desires to do so but that the "rule" is not an impediment to a reexamination and alteration of a prior judicial interpretation of a statute when the court prefers that outcome.

In my view, the rule of prior interpretation fairly is open to scrutiny, particularly on the question whether it has introduced needless and harmful rigidity into this court's methodology of statutory construction. Judicial interpretations of statutes that control many areas of commerce, such as those that concern real property, should not be reconsidered, except in the narrowest of circumstances, in order to serve the public's strong need for stability in commercial transactions. However, the justification for any judicial disinclination to modify prior statutory interpretations can be less weighty in other contexts, such as statutory regulation of the authority of governmental bodies and officers and procedures related to

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[3] Carlson overruled Webster v. General Motors Accept., 267 Or. 304, 516 P.2d 1275 (1973), and Wetzstein v. Hemstreet, 276 Or. 623, 555 P.2d 1243 (1976).

operation of the courts. In those areas of law, and perhaps others, if new legal research and advocacy can demonstrate that a prior statutory interpretation was inaccurate and now is causing injustice, the court's proper role under the doctrine of stare decisis is to modify its former statutory interpretation and adopt a new, correct interpretation that is consonant with the legislature's intention.

Advocates who may wish to raise questions regarding the rule of prior interpretation before this court should recognize that some members of the court--not this member--may expect argument about whether the court's statements in G.L. v. Kaiser Foundation Hospitals, Inc., 306 Or. 54, 59, 757 P.2d 1347 (1988) (stating "three premises" for reconsideration of a nonstatutory rule or doctrine), impose a barrier to modification of the rule of prior interpretation. Cautious counsel should not neglect adequate treatment of those premises in briefing and argument.

For the reasons expressed above, I agree that this matter is properly before the court on a petition for a writ of mandamus.

2. Republican Form of Government Clause.

Article IV, section 4, of the United States Constitution, provides in part that

> "[t]he United States shall guarantee to every State in this Union a Republican Form of Government * * *."

That provision is part of the constitutional law--the supreme law of this land--that every Oregon judge swears to uphold upon taking office. Nevertheless, several rulings of the United States Supreme Court have stunted the development of any appreciable jurisprudence regarding the enforceability of that clause, at least in state courts. For example, in Pacific

Telephone Co. v. Oregon, 223 U.S. 118, 151, 32 S.Ct. 224, 231, 56 L.Ed. 377 (1912), the Court held that federal enforcement of the clause was a responsibility of Congress, not the federal courts. Although Pacific Telephone purports to decide only the justiciability of the clause in federal, not state, courts, some (although not all) state courts have refused to consider cases arising under the clause on the theory that decisions like Pacific Telephone also preclude state court litigation. Cf. Van Sickle v. Shanahan, 212 Kan. 426, 511 P.2d 223 (1973) (examining a Kansas constitutional amendment under the Guarantee Clause) with State v. Mountain Timber Co., 75 Wash. 581, 590, 135 P. 645 (1913), aff'd 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917), and Cochran v. Louisiana State Board of Education, 168 La. 1030, 1032-33, 123 So. 664 (1928), aff'd 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930) (each case holding that the Guarantee Clause dispute was not justiciable; result affirmed by United States Supreme Court). The majority reads the latter cases to say that state courts cannot exercise their judicial power over Guarantee Clause disputes. I disagree.[4]

State courts possess general authority to decide, under state law, that a particular dispute is not a justiciable controversy that the courts of the state will resolve through the exercise of their judicial power. A host of factors may influence a state court to reach such a conclusion, including opinions of the United States Supreme Court about the justiciability of Guarantee Clause claims in federal courts. Consequently, when the state courts of Washington and Louisiana in Mountain Timber and Cochran treated the claims

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[4] I address the justiciability aspect of defendant judge's Guarantee Clause argument because that argument offers an alternative basis for sustaining the judgment below. In dissenting from the majority's justiciability ruling, I make no comment regarding defendant judge's other alternative arguments, under state and federal law, offered to sustain the judgment.

before them as "nonjusticiable," the decisions constituted determinations under state law that the judicial power of those states did not extend to the resolution of those disputes.

Nothing in the Guarantee Clause or any other law compels a state court to entertain Guarantee Clause litigation if it elects not to do so, whether on grounds of nonjusticiability or some other ground. Properly viewed, the Supreme Court's affirmances in Mountain Timber and Cochran determine only that the Guarantee Clause does not compel any state to treat such a claim as a justiciable controversy. Neither state court violated any federal law by deciding not to address Guarantee Clause claims. I do not read those decisions to say that a state court possesses no authority to entertain a Guarantee Clause claim that is otherwise justiciable if it chooses to do so. That question, which concerns the scope of every state's judicial power, was neither addressed nor decided finally in those cases.

Also undecided, under existing United States Supreme Court cases, is the precise character of the duty of each state, and the interplay of that duty with that of the federal government, under the Guarantee Clause. The majority does not address the justiciability of the alleged violation of Oregon's duty under that clause. In Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175, 22 L.Ed. 627 (1874), the Supreme Court said:

> "The guaranty necessarily implies a duty on the part of the States themselves to provide such a government."

Taking that statement at face value, as we must, we can only conclude that Oregon is duty-bound, under the Guarantee Clause, to provide a government that is republican in form. That state duty is distinct from the other duty, expressed in the clause, compelling the federal government to guarantee a

republican form of government to every state. None of the authorities relied on by the majority addresses the justiciability in Oregon's state courts of a controversy arising from Oregon's independent duty, expressed in Minor, under the Guarantee Clause. Moreover, that issue is distinct from the still unresolved question whether a state court can decide, under the Guarantee Clause, whether state lawmaking violates any aspect of the federal government's duty to assure a republican government in every state.

To be sure, Minor v. Happersett predated Pacific Telephone by several decades. However, Pacific Telephone involved only an invocation of the federal government's duty to guarantee a republican government in the states and did not address or analyze the justiciability in state court of a state's duty under Article IV, section 4. Moreover, whatever the strength of the logic underlying Pacific Telephone--that only Congress may create rules with respect to the federal government's Guarantee Clause obligation to the states--that logic is not easily applied in the context of one state's violation of its duty under that clause by the enactment of a statute by initiative. If Oregon enacts a single statute or state constitutional provision in a manner that offends Oregon's obligation under the principles of republican government, it is virtually inconceivable that Congress will respond with federal legislation to correct that sort of problem. In my view, the majority overreads Pacific Telephone to preclude litigation in state courts at least with respect to Oregon's obligation under Article IV, section 4.

The precise nature of Oregon's obligation under the republican Guarantee Clause is not crystal clear. We know less about what governmental forms and methods always are republican than those that we know clearly are not. For example, James Madison distinguished republicanism--policymaking achieved through the deliberation of representative lawmakers--from direct democracy and

rejected the latter. He said in The Federalist No. 10, at 133 (James Madison) (B.F. Wright, ed 1961):

> "From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.
>
> "A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. * * *
>
> "The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

"The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

" * * * * *

"The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the most easily will they concert and execute their plans of oppression. Extend the sphere, and you take

> in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number who concurrence is necessary."

In The Federalist No. 14, at 150 (James Madison) (B.F. Wright, ed 1961), Madison underscored his preference for a republican form of government, rather than a direct democracy, over the large territory occupied by the Union:

> "The error which limits republican government to a narrow district has been unfolded and refuted in preceding papers. I remark here only that it seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy, applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region."

In The Federalist No. 39, at 282 (James Madison) (B.F. Wright, ed 1961), Madison attempts to make the case that the government proposed in the new constitution is republican in form, rather than a direct democracy, by emphasizing that the President, members of Congress, and,

indirectly, federal judges, derive their governmental powers directly or indirectly from the people, and adds:

> "Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter."

The point of those passages was summarized by the United States Supreme Court in In re Duncan, 139 U.S. 449, 461, 11 S.Ct. 573, 577, 35 L.Ed. 219 (1891):

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

Justice Hans A. Linde, formerly of this court has drawn attention to the above-quoted passage from Duncan and the importance of deliberative lawmaking by the people's representatives as an institutional protection, long predating the Fourteenth Amendment, against the oppression of political minorities:

> "To its architects, republican government thus depended on deliberation by representative institutions

> not only for rational public policies; it also was the essential safeguard of civil and religious rights. The Guaranty Clause must be understood in a context without a nationwide bill of rights or judicial review. The Constitution contained very few rights against state lawmaking; republican processes were supposed to prevent majoritarian as well as autocratic abuse. The Guaranty Clause did not change meaning because the Fourteenth Amendment ninety years later created a new task for federal courts. The United States Supreme Court understood this when, a few years before Oregon adopted the initiative process, it linked the guarantee of republican government with protections against 'the sudden impulses of mere majorities.'" Hans A. Linde, When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or L Rev 19, 33 (1993) (emphasis added).

See also Catherine A. Rogers and David L. Faigman, "And To The Republic For Which It Stands": Guaranteeing a Republican Form of Government, 23 Hastings Const LQ 1057 (1996); Hans A. Linde, Who is Responsible For Republican Government?, 65 Colo L Rev 709, 728 (1994) (arguing that state officials have a responsibility to govern by republican means, and that state courts, bound by the federal constitution as the supreme law of the land, are not free to shift to other political branches the resolution of claims under the Guarantee Clause); Hans A. Linde, When Is Initiative Lawmaking Not "Republican Government"?, 17 Hastings Const LQ 159 (1989).

It is by no means certain that the manner of lawmaking observed by Oregon in respect to the enactment of Ballot Measure 11 violates the republican guarantee. It is a statute adopted through the initiative, and it controls certain sentencing decisions by state court judges. As a legislative direction that confines the authority of a state officer, its

subject matter may pass muster despite the absence of either deliberation by representative lawmakers or the opportunity for a gubernatorial veto during the enactment process.

However, the enactment of Ballot Measure 11 occurred at the same time as the enactment of Ballot Measure 10, Oregon Constitution, Article IV, section 33, which provides:

> "Notwithstanding the provisions of section 25 of this Article, a two- thirds vote of all the members elected to each house shall be necessary to pass a bill that reduces a criminal sentence approved by the people under section 1 of this Article."

The effect of Ballot Measure 10 is also uncertain, but it appears to preclude a legislative alteration of Ballot Measure 11 except by the supermajority voting margin described in its text. The effect of that requirement on the question of the compliance of Ballot Measure 11 with the Guarantee Clause similarly is uncertain. However, the correct answer to these important questions is not to treat them as nonjusticiable. Even if Vanzant is able to establish a Guarantee Clause violation, the result of that determination is debatable. The articles by Justice Linde and Ms. Rogers and Professor Faigman, cited above, sharply disagree regarding the proper resolution of a Guarantee Clause challenge to the result of initiative lawmaking. All of those questions deserve further focused briefing by the parties and perhaps further oral argument.

The majority's nonjusticiability determination sweeps those issues out of this court unanswered. Fortunately, the United States Supreme Court may be prepared to reconsider its previous conflicting statements about the justiciability of Guarantee Clause claims. See New York v. United States, 505 U.S. 144, 184-85, 112 S.Ct. 2408, 2432-33, 120 L.Ed.2d 120 (1992), in which the Court assumed that the Guarantee

Clause dispute before it was justiciable, and cited Reynolds v. Sims, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392, 12 L.Ed.2d 506 (1964) ("some questions raised under the Guarantee Clause are nonjusticiable") (emphasis added), and several scholarly writings that urge the courts to address the merits of Guarantee Clause claims, at least in some circumstances. Pacific Telephone, Cochran, and Mountain Timber, on which the majority relies most heavily, predate Reynolds, yet the majority takes the view, in contrast to Reynolds, that all Guarantee Clause claims are nonjusticiable.

As New York demonstrates, litigants who seek to enforce the federal government's Guarantee Clause obligation in state or federal court face a body of case law regarding justiciability that is less than clear and consistent. The Supreme Court cannot long continue to assume but not decide the justiciability of Guarantee Clause claims without further exacerbating the problem. However, setting aside that distinct question, the Court's cases do not direct state appellate courts to treat as nonjusticiable a claim that, in violation of the Guarantee Clause, a state government has breached its own duty to enact its laws by the process that is the very definition of republican government: deliberative decisionmaking by the people's chosen representatives. This court must address that question in order to decide whether the term of imprisonment for which relator advocates would violate the supreme law of the land. Unlike the United States Supreme Court, we have no authority to withhold a judicial decision and tender the issue to Congress for a political resolution.

To the many state courts that presently are considering, in concrete cases, a host of Guarantee Clause challenges to initiated laws adopted without the protection of deliberation by representative legislative bodies, the Court's allusion in New York that it may clarify its position on justiciability comes as welcome news. However, in regard to the particular claims asserted here, I do not agree that the Court's existing case law

imposes the barrier of nonjusticiability at the door of this court.

For the reasons discussed above, I concur in part and dissent in part.

FADELEY, J., joins in part 2 of this opinion.

FADELEY, Justice, dissenting in part.

I dissent in part and do so by joining only the dissenting portion of Justice Durham's separate opinion.

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Plaintiff-Relator,

v.

SC S42938

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County County,

ORDER DENYING RECONSIDERATION

Defendant.

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 22nd day of April, 1997.

/s/ Wallace P. Carson, Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Plaintiff-Relator,

v.

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County County,

Defendant.

Relating to Jackson County Circuit Court No. 952538CC2

SC S42938

PEREMPTORY WRIT OF MANDAMUS

TO: The Honorable L. L. Sawyer

On January 12, 1996, relator filed a petition for alternative writ of mandamus seeking certain relief in *State v. Vanzant*, Jackson County Circuit Court No. 952538CC2. By order dated March 6, 1996, the court allowed the petition and directed the State Court Administrator to issue an alternative writ of mandamus. Thereafter, defendant moved to dismiss the alternative writ of mandamus, the matter was briefed and orally argued, and, on February 21, 1997, the court issued its decision directing issuance of a peremptory writ of mandamus.

WHEREFORE, in the name of the State of Oregon, you hereby commanded forthwith to enter a corrected judgment in the case of *State v. Vanzant*, Jackson County Circuit Court 952538CC2, imposing the sentence for the crime of second degree manslaughter required by ORS 137.700(2)(e).

Further, you are commanded to return this Writ, with your certificate annexed, showing that you have done as commanded.

DATED this 23rd day of April, 1997.

KINGSLEY W. CLICK
State Court Administrator

By: /s/ Donna L. Berg
Authorized Representative of
the State Court Administrator

(2)

Supreme Court, U.S.
FILED
AUG 12 1997
CLERK

No. 97-129

In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent,

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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BRIEF OF HANS A. LINDE AND DAVID B. FROHNMAYER AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Hans A. Linde is a retired judge of the Oregon Supreme Court and a long-time professor of constitutional law.

David B. Frohnmayer has been Dean and Professor of Law at the University of Oregon, a member of the Oregon Legislative Assembly, Attorney General of Oregon, and now is President of the University of Oregon.

The sole interest of both *amici curiae* is in preserving the jurisdiction of Oregon courts to secure the state's continued adherence to constitutional processes of republican government. Both *amici* are members of the bar of this Court.[1] Letters of consent to the submission of this brief are filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court erred in holding that the United States Constitution deprives state courts of jurisdiction to determine whether a particular governmental process in the state is incompatible with the republican form of government mandated by the Constitution. Other state courts, and the Oregon Supreme Court on earlier occasions, have reached the opposite conclusion on this threshold issue.

The opinion below reached neither the premises nor the merits of the particular claim in this case. The immediate issue is solely the authority of state courts with respect to maintaining republican processes in their own states. The case does not require this Court to reconsider the decision in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912), with respect to a

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[1] This brief was prepared entirely by *amici curiae*, with no contribution of content or funds by any interested party or their respective counsel.

federal judicial role under the Guarantee Clause, U.S. Const., Art. IV, § 4. Pacific States did not hold or suggest that the Oregon court lacked authority to decide against the merits of the telephone company's claim. This Court's subsequent decisions do not deprive state courts of this authority, as the opinion below mistakenly asserts. Moreover, Pacific States 85 years ago characterized that case as an attack on the entire Oregon government, which can not be said about the present case.

II. The Constitution obligates states to maintain republican forms of government, as this Court has previously recognized. It is not a meaningless obligation. The role of state courts in guarding their states' adherence to this mandate is a matter of fundamental importance. To impose a federal bar on the authority of the states' judges would be an extraordinary incursion into the states and the very institutions on which the Constitution (in Art. VI, cl. 2) expressly relies for its application in the states.

Modern developments give practical importance to preserving the state courts' authority as a safeguard against departures from republican governance. Congressional intervention in particular governmental actions in individual states is not a realistic alternative. Nor is federal intervention necessary as long as the state's own legal institutions can preserve republican processes. State officials, particularly attorneys general, face serious claims of this nature. State governments, their courts, and their people should not be left under a misapprehension that this Court forbids state judges to carry out their assigned reviews of the decisions of attorneys general and other officials.

ARGUMENT

I. INTRODUCTION

Whether the Constitution denies state courts authority to assure adherence to republican government in their own states is a new question in this Court, though not in state courts. The

correct answer rests on historic principles and has important implications.

A. *The Origins Of The Issue.*

Republican government in every state is an essential principle of American constitutionalism. The 1787 constitutional convention placed this principle in the United States Constitution, at a time when the Constitution guaranteed citizens few personal rights within their own states beyond the right to be governed by republican institutions. U.S. Const. Art. IV, § 4. The national guarantee "necessarily implies a duty on the part of the States themselves to provide such a government." Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

Like the present case, Pacific States came to this Court from Oregon, which had adopted lawmaking by initiative in 1902. Within months, before the new system had been used, the Oregon Supreme Court defended its "republican" character. Kadderly v. City of Portland, 44 Or. 118, 74 P. 710 (1903), reh'g denied, 44 Or. 160, 75 P. 222 (1904). Kadderly's reasoning is important, because the Oregon court relied on it in deciding Pacific States in 1912, and because its modern application was the issue that the current court deemed itself precluded from deciding.

Kadderly's anticipatory defense rested on these propositions: (1) The purpose of the Guarantee Clause was to protect the people of the several States against monarchical and aristocratic government and against insurrections and domestic violence,[2] and "to prevent them from abolishing a republican form of government." Kadderly, 74 P. at 719. (2) "A republican form of government is a government administered by representatives

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[2] Here the Oregon court apparently meant the final phrase of U.S. Const. Art. IV, § 4, following the guarantee of republican government.

chosen or appointed by the people or by their authority" (citing James Madison's Federalist No. 39), though the Constitution does not prescribe this representative government to take a particular form. Id. (3) The new provisions for direct popular lawmaking did not alter the form of Oregon's government, because the legislature, governor, and courts continued to exist. (4) "Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes,[3] and may be amended or repealed by the Legislature at will." Kadderly, 74 P. at 720. (The court repeated this important reason in Straw v. Harris, 54 Or. 424, 431, 103 P. 777, 780 (1909).)

Thus the Oregon court defended the system of direct lawmaking in principle, against a wholly abstract attack under the Guarantee Clause, on grounds that the state's existing representative institutions and courts retained the power to override initiated laws, although the voters also could "veto or defeat" bills passed by their representatives. Kadderly, 74 P. at 720. A brief citation to Kadderly sufficed later to reject the attack on the initiated tax in Pacific States, because the tax initiative was a simple statute and subject to judicial review as well as to repeal by the legislature.

This Court dismissed the telephone company's writ of error, holding that it did not have jurisdiction to review claims under the Guarantee Clause. Pacific States, 223 U.S. 118 (1912).[4]

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[3] This observation in 1903, when substantive review under the 14th Amendment had barely begun, meant primarily limitations under the state constitution.

[4] On the same grounds, the Court also dismissed a writ of error in Kiernan v. Portland, 223 U.S. 159 (1912). The Court described the claims presented in that case as "so interwoven as to cause it to be difficult to separate them or state with precision the questions of a Federal nature which they embrace," but concluded that the federal claims were disposed of by the opinion in Pacific States. Kiernan, 223 U.S at 163-164.

Most important, this Court did not hold that the Oregon court lacked jurisdiction for its decision of that claim. The opinion, however, has led to confusion and division in state courts.

Early state cases had followed Oregon's Kadderly opinion to reject attacks on direct legislation on the merits. See In re Pfahler, 88 P. 270 (Cal. 1906), Ex parte Wagner, 95 P. 435 (Okla. 1908). Some state courts continued to do so after this Court denied its own jurisdiction in Pacific States. See, e.g., State ex rel. Foote v. Board of Comm'rs, 144 P. 241 (Kan. 1914), Breedlove v. Suttles, 188 S.E. 140 (Ga. 1936). Other state courts dismissed claims under the Guarantee Clause with simple citations to Pacific States, without analyzing whether that opinion, beyond disowning this Court's responsibility for the guarantee within the federal government, decided anything about state courts. State v. Mountain Timber Co., 75 Wash. 581, 590, 135 P. 645, 649 (1913), aff'd 243 U.S. 219 (1917); Borden v. Louisiana Board of Education, 168 La. 1005, 1023, 123 So.2d 655, 661 (1929), followed in Cochran v. Louisiana State Board of Education, 168 La. 1030, 123 So. 664 (1929), aff'd 281 U.S. 370 (1930).

The majority below mistakenly relied on this Court's affirmance of Mountain Timber and Cochran, unlike its earlier dismissal of the writ of error in Pacific States. In those cases, the appellants raised and the state courts decided other federal questions, which of course precluded dismissing those writs of error for lack of jurisdiction.

B. *Contemporary Conflict In State Decisions.*

Many state courts have continued to consider claims of "nonrepublican" government. In modern examples, the Arizona Court of Appeals, after noting doubts in the trial court about justiciability, rejected on the merits a claim that lawmaking by statewide initiatives is not republican. Iman v. Southern Pacific Co., 435 P.2d 851 (Ariz. App. 1968). The Kansas Supreme

Court sustained a constitutional amendment allowing the Governor to reorganize executive departments. Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973). The Oklahoma Supreme Court considered a challenge to a constitutional amendment requiring referenda on tax measures, despite arguments that the issue was nonjusticiable. In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991). See also, Cagle v. Qualified Electors of Winston, 470 So.2d 1208 (Ala. 1985) (deciding challenge to a "special law" for a county referendum); Walling v. North Central Texas Municipal Water Authority, 359 S.W. 2d 546 (Texas App. 1962) (deciding challenge to local district scheme of representation); State v. Lehtola, 198 N.W.2d 354 (Wis. 1972) (defending district attorney's power to issue criminal information); In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 315-18 (Colo. 1975) (defending judicial role in legislative districting); In re Advisory Opinion to the Governor, 612 A.2d 1, 15-16 (R.I. 1992) (deciding a challenge to appointment ethics committee members).

In California, a Court of Appeals declined to decide such a claim with a brief reference to Pacific States, without further analysis. Williams v. City of San Carlos, 43 Cal. Rptr. 486, 489 (1965). The California Supreme Court, which originally adopted Oregon's Kadderly precedent, has not recently considered the issue. The most recent illustration of uncertainty in the states is State v. Manussier, 921 P.2d 473 (Wash. 1996), in which the Washington Supreme Court declared a Guarantee Clause claim nonjusticiable but proceeded to decide the merits anyway.

The Oregon Supreme Court itself has taken conflicting positions on its powers after Pacific States. In one case, the court declared itself "bound by the interpretation placed on the Constitution of the United States" that republican government is not a question for judicial inquiry, and therefore "powerless to determine whether or not the constitutional amendment before us violates article IV, § 4 of the Federal Constitution." Baum v. Newbry, 200 Or. 576, 584-585, 267 P.2d 220, 224 (1954).

More recently, however, the Oregon Supreme Court described this Court's position more accurately:

> "[W]ithin the federal government, the enforcement of the guarantee is assigned not to the federal courts but to the political branches. Thus, claims arising under Article IV, section 4, do not present justiciable controversies in federal courts.
>
> "That does not mean that the states may not adjudicate the compatibility of state law with the guarantee clause." State v. Montez, 309 Or. 564, 603-604, 789 P.2d 1352, 1377 (1990) (citation omitted).

In the present case, the majority opinion reverses direction, asserting that this Court has "squarely" held that state courts may not review claims of nonrepublican government, State ex rel. Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997), while the dissenters correctly read Pacific States to deal only with federal courts.

These conflicting state decisions show that state courts need and deserve a clear answer to the doubts thrown on their traditional role in state government. This Court does not readily interfere with that role, even when state courts decide federal questions under circumstances when federal courts would not do so. See, e.g., Doremus v. Board of Education of Hawthorne, 342 U.S. 429 (1952) (dismissing appeal by municipal taxpayers who had standing in state court); Asarco Inc. v. Kadish, 490 U.S. 605 (1989) (reviewing state court judgment on behalf of defendants when plaintiffs had standing in state court, though not in federal court). In Asarco, the separate opinion of the Chief Justice and Justice Scalia pointed out that state courts sometimes have to decide questions of federal statutory and constitutional law affecting "the governance of the state" that this Court cannot review:

> "This is true, but I think it a rather unremarkable proposition. Some state courts render advisory decisions on federal law of no binding force even within the State [citing the Massachusetts and Michigan constitutions]. In each instance, the interpretation of federal law may affect the governance of the state and thereby make some people better off and some worse off. Yet none of these decisions of federal law are reviewable in this or any other federal court." Asarco, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part)[5].

This precisely describes one of the propositions on which the Oregon court erred. No national purpose is served, and potential future harm may be done, by excluding state courts from any role in securing republican government in their own states.

II. LEGAL ANALYSIS

Neither the Constitution nor decisions of this Court deny state courts the authority to review whether a governmental process is incompatible with republican government. The Oregon court's contrary proposition, that the U.S. Constitution prevents state courts from reviewing their states' adherence to republican processes, stands the Constitution on its head. The correct constitutional rule is simple and direct, regardless which approach one takes to constitutional analysis.

1. **Textually**, the Guarantee Clause, U.S. Const. Art. IV, § 4, postulates that the states, those which formed the United States and those admitted later, have entered the Union with republican governments. The United States would guarantee that

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[5] It should be noted that the present case does not involve the concern there expressed by the Chief Justice and Justice Scalia, that a party first raising the federal claim (here the defendant in a criminal proceeding) could claim no actual injury to himself.

the state governments would stay republican. But they had to be republican at the outset. This was and remains a sine qua non of statehood.

Article IV, § 4, therefore, embodies two elements. Primary is each state's responsibility for maintaining a republican government. This is each state's most fundamental duty to the nation and to its own citizens. This Court stated the obvious about each state's own constitutional responsibility, that the clause "necessarily implies a duty of the States themselves to provide such a government." Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

Indeed, if the Constitution meant to leave states free to adopt nonrepublican forms of government, a clause directing the United States to "guarantee to every State in this Union a republican form of government" would be anomalous. The clause imposes on the United States the important but secondary, derivative, duty to assure that each state governs through republican institutions. That national responsibility is not in issue here. But obviously the national commitment to republican state governments is well served when each state takes primary responsibility for republican governance.

The Oregon court does not deny that the Constitution requires Oregon to have a republican government. Yet the opinion ignores whose responsibility it is to make that constitutional determination, just so the court is excused from it. Every state official shares the obligation to govern according to the United States Constitution as well as the state's, and generally swears to do so. But the Constitution expressly holds the states' judges responsible for the officials' compliance. The Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. State judges may not refuse to decide a federal issue when its decision is necessary to a case properly before the court. The

Oregon court recognized that duty in Kadderly, Pacific States, and Montez but now refuses it in this case.

2. Historically, republican government was not only an option for which, if chosen, a state might invoke national protection. Rather, republican government was a state's obligation. Insistence that future states be republican dates from the first cessions of the states' western territories to the Continental Congress. It was incorporated in the Northwest Ordinance. See William W. Wiecek, The Guarantee Clause of the United States 17-18 (1972). At the convention, the requirement was postulated by Governor Randolph in the eleventh Virginia resolution, which became the Guarantee Clause, and it was applied in the admission of new states.[6] It continues to be binding law for each state.

"Republican" government, to the drafters of the clause (primarily James Madison and James Wilson) and their colleagues, connoted characteristics beyond merely excluding monarchy or hereditary aristocracy. They also were concerned to assure the safeguards of deliberative institutions and to avoid precipitous acts motivated (in Enlightenment rather than modern terms) by "passion" or "interest." The Constitution does not require a single definition of republican government (the Convention decided not to prescribe uniform state constitutions), but it does require scrutiny for processes that are incompatible with any republican government. Because the decision below ruled only against state court jurisdiction, this brief discusses

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[6] Randolph stated that the resolution had "two objects: first, to secure a republican government; secondly, to suppress domestic commotions." Elliot's Debates, vol. V at 333. He later proposed, with Madison's second, to state even more clearly that "no State be at liberty to form any other than a republican government," a phrasing then restated by James Wilson, with their consent, to state: "That a republican form of government shall be guaranteed to each state, and that each State shall be protected against foreign and domestic violence." Id.

potentially incompatible processes only briefly to show the practical importance of the issue to the states.

3. Structurally, nothing argues against the role of state courts in preserving republican government in their states, and much argues for it. A claim that particular institutional forms or processes of state government depart from republican government may be unfounded, but all such claims cannot be dismissed summarily. State government structures do not follow the national model of a single source of legislation, administered by agencies that are created and funded by the legislature and directed by a single elected chief executive. Thus various forms of governmental power exercised by independent executive officials, or by local or essentially private entities, as well as some types of initiatives, have been challenged as "nonrepublican" and reviewed by state courts.

When such a constitutional claim is raised, whatever its merits, some official in the state must and does decide it. It may be an elections officer (in Oregon, the Secretary of State), and usually the state's separately elected attorney general, a political official. No functional reason supports making their legal opinions nonreviewable in the state's courts. If Oregon's Secretary of State had disqualified the disputed initiative in this case as an ineligible departure from republican lawmaking, must its sponsors be denied judicial review of that official's action? To the contrary, courts are the chief institutions designed to decide such disputes in a principled fashion, after briefing, argument, and collegial discussion, with opinions based on reasons that apply beyond the single case. Indeed, a substantial number of states call upon the courts to do so in advisory opinions. See, e.g., In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308, 315-318 (Colo. 1975), In re Advisory Opinion to the Governor, 612 A.2d 1, 15-16 (R.I. 1992).

It is the states' judges that the Constitution expressly binds to give its provisions legal force, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Nothing excludes the states' duty to maintain republican governments from that assignment. Congress could not, under Article IV, § 4, by law exempt a state from the obligation to govern by republican means, nor does Article VI, clause 2, permit Congress to exempt state courts from the obligation to apply the Constitution. The Oregon court erred in thinking that this Court had done either of these things.

4. **Doctrinally**, the majority below erred in relying on Pacific States for the proposition that enforcement of the duty to maintain republican government is "not justiciable" in state courts. State ex rel Huddleston, 324 Or. at 618, 932 P.2d at 1157 (1997). The term "not justiciable" states only a conclusion, not a reason or an explanation.

The holding in Pacific States was to dismiss a writ of error for want of jurisdiction in this Court. The explanation was that Congress, rather than this Court, was charged with the guarantee by "The United States" of republican government in each state. Neither the holding nor the explanation supports the same conclusion for a state court's role in enforcing the state's obligation to govern by republican means.

Chief Justice White's opinion inflated the telephone company's pleading to a "theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon," a contention that, "if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption the initiative and referendum," and, indeed,

would leave Oregon with no governmental functions.[7] Pacific States, 223 U.S. at 141.

Whether or not in 1912 that was a necessary or fair reading of the telephone company's pleading, it does not describe the present controversy. Neither the petition for certiorari nor *amici curiae* attack the initiative system or Oregon's general form of government. To the contrary, *amici* believe that initiatives serve legitimate, useful, and sometimes essential functions. But it is possible for an otherwise soundly republican government to be faced with misuses of the initiative that prevent republican institutions from functioning, or that depart from republican processes on particular issues. Pacific States denied this Court's jurisdiction over a wholesale attack on the entire system, but it said nothing about such counter-republican misuses.

III. THE CONTEMPORARY URGENCY OF THE JURISDICTIONAL ISSUE

Three developments have raised new challenges to initiative measures above other claims of nonrepublican processes. These are (1) the turn to initiating constitutional amendments to put laws beyond legislative change; (2) the effect of initiated tax limitations and mandatory spending on the states' budget process; and (3) initiatives that short circuit the safeguards that deliberation by legislatures and governs provide against majoritarian attacks on vulnerable minorities. If space permitted, each of these could be documented in detail.

1. **The turn to initiated amendments.** The original defense of initiatives, in Kadderly, was that initiated laws would not prevent the existing representative institutions from continued

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[7] The end of the opinion again characterized the telephone company's claim as "an assault . . . on the state as a state," to "demand of the state that it establish a right to exist as a state, republican in form." Pacific States, 223 U.S. at 150-151.

lawmaking. Recent developments have undermined that assumption. Many initiatives now place detailed, extensive laws directly into the constitution in order to prevent legislatures from changing the law or courts from testing them against the state's constitution. Sometimes, as in California, any law enacted upon an initiative can thereafter be changed only by another referendum. See, Cal. Const., Art. II, §§ 16-20. Subordinating representative legislation to plebiscitary lawmaking negates the premise of Oregon's Kadderly precedent, but the Oregon Supreme Court thought that it was forbidden to consider how Kadderly applied in the present case.

2. **Destroying the state's budget process.** Beginning with California's Proposition 13 (Cal. Const., Art. XIII, §§ 1-6), initiatives in a number of states, including Oregon, have written detailed tax limitation programs into the states' constitutions, while other initiative measures have locked into state constitutions programs requiring large expenditures, particularly on the state's criminal justice and penal institutions. Together, these separately enacted tax ceilings and spending mandates drain revenues from other programs, including the constitutionally mandated public schools.[8]

Fiscal initiative amendments may not always depart from republican government, but they show the importance of letting state courts decide such claims, as the Oklahoma Supreme Court did in 1991. In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991). In that case, an initiative amendment requiring referenda on most revenue measures was claimed to destroy representative government. Rejecting an argument that the claim was "nonjusticiable," the Oklahoma court stated that "the dispositive question presented is whether the Petition would so

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[8] Had an earlier California initiative mandating state pensions for all Californians not been repealed, its coexistence with Proposition 13 could destroy the essential budgetary function of the state government. See Cal. Const., Art. XXI, repealed by Cal. Const., Art. XXVII.

alter the existing system of government that it would constitute a loss of representative government." In re Initiative Petition No. 348, 820 P.2d at 780. The court acknowledged that state government depended on the legislature's power to raise revenues, but it predicted that the mandatory referral of new taxes would only make representative government more difficult, not impossible.

Two points add importance to this recent decision. One is the Oklahoma court's insight that the effect on representative government is the test whether other lawmaking processes are compatible with republican government. This test followed Kadderly's original analysis. The second point is the court's recognition of the nature of budgeting as an indispensable attribute of organized government. The Oklahoma court did not have to face the interplay between initiated constitutional tax limitations and other initiated amendments forcing large expenditures. The coexistence of such separate initiatives does "so alter the existing system of government that it would constitute a loss of representative government." In budgeting, governors and legislatures must consider and literally, not metaphorically, "balance" all interests in the state's total spending and revenue sources. Voters on separate initiatives cannot balance budgets, and when sponsors choose the form of constitutional amendments, they deliberately destroy the ability of representative government to strike a comprehensive balance.

3. **Circumventing legislative concern for vulnerable minorities.** This Court has had experience with plebiscites on initiatives directed against minorities identified by personal characteristics or beliefs. In 1922, for instance, the anti-Catholic Ku Klux Klan briefly achieved political dominance in Oregon and gained adoption of an initiative aimed at eliminating parochial schools. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). Later examples were the initiatives in Reitman v. Mulkey, 387 U.S. 369 (1967) (California amendment prohibiting open housing laws), in Hunter v. Erickson, 393 U.S. 385 (1969) (Washington

amendment requiring referral of open housing laws), Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (Washington initiative proscribing means of school desegregation), and the initiatives in Colorado and other states to bar equal rights laws for homosexuals, see Romer v. Evans, ___U.S. ___, 116 S.Ct. 1620 (1996). That the Court found grounds in the 14th Amendment to invalidate these initiatives does not make the manner of their enactment irrelevant, for two reasons.

First, the states' obligation to govern by republican means preceded the 14th amendment by 80 years. Republican government was to preserve liberty by means of deliberative institutions, long before the Constitution protected noneconomic rights of individuals against their own states. James Madison wrote: "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part." The Federalist No. 51 at 351 (Jacob E. Cooke ed. 1982). He considered "a society under the forms of which the stronger faction can readily unite and oppress the weaker" to be as anarchical as the "state of nature." Id. at 352.[9] The later adoption of the 14th Amendment and this Court's evolving substantive review of state laws did not amend the states' original duty to maintain deliberative governments, nor make it irrelevant. Subsequently, this Court, like James Madison a century earlier, asserted the importance of "republican" state constitutions in setting boundaries to "the sudden impulses of mere majorities." In re Duncan, 139 U.S. 449, 461 (1891).

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[9] Madison's fellow theorist of republican government, James Wilson, was similarly concerned about majoritarian "passions." See, 1 The Works of James Wilson 291 (Robert G. McCloskey ed., 1967). Improper "interest" is illustrated by a recent Washington measure whose sponsors proposed to share the profit of expanded gambling operations with those voters who supported the measure. (See The Oregonian, "Gambling Vote Pays a Jackpot", August 27, 1995, 1995 WL 9185949.) The offer should disqualify the initiative under any republican lawmaking process.

Second, it is not immaterial how a law is made if only its substance does not invade some guaranteed right. Even monarchs (or dictators) make laws that would be valid if enacted by parliaments. But issues of legitimate process logically precede issues of substantive validity. A legitimate process might have produced a different law, or none. Initiatives aside, citizens are guaranteed republican means for state acts that involve no 14th Amendment rights.

Substantive review under the 14th Amendment generally is available only after a measure has been adopted. Some illegitimate procedures, however, matter before the votes are counted. Campaigns on initiatives are not conducted like legislative debates. The targets of an initiative campaign, like the campaigns against parochial schools, against open housing and desegregated schools, and against homosexuals in Oregon and elsewhere, suffer the psychic and social harm of being subjected to the passions of such a campaign and plebiscite (not to mention the financial costs of defending against it), whether or not the measure ultimately passes.[10] When the process itself is not legitimate, they should not have to await a later adjudication of the substance of the measure. If, however, an official decides that such a proposed initiative diverges from republican lawmaking, there also is no reason for precluding the state's courts from reviewing that decision.

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[10] The character of the Oregon initiative campaign against homosexuals is briefly indicated in Hans A. Linde, When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19, 35-38, 42 n. 83 (1993). In a statement on that campaign, the Oregon Catholic Conference of Bishops deplored that the initiative measure did not "provide an appropriate forum for to discuss in a reasonable and civil manner the important social issues involved," and that its proponents "inappropriately used" the initiative "to promote what they view as a referendum on the morality of homosexuality." Id.

IV. STATE COURT REVIEW FOR REPUBLICAN PROCESSES IS NOT UNWORKABLE

This Court may agree that the issue of state court authority is novel, important, and unsettled among state courts, yet perceive a seeming anomaly in state court review of their states' compliance with a constitutional obligation that this Court itself has declined to adjudicate. Nonetheless, that concern would deserve an opinion, not denial of review.

The Court could always reexamine Pacific States and distinguish its description of an attack on a state's whole legal system from narrower claims that a particular governmental process departs from republican governance. *Amici curiae* believe that this step is warranted, but that the present case still should be remanded for an opinion from the Oregon court. Even without such a step, the Court should not preclude normal state court review of such claims, for the following reasons.

1. Each state's constitutional obligation to maintain republican governments exists independently of the assignment within the national government of the political acts to guarantee it. The federal "political question doctrine" (if it applies to narrowly focused, specific legal claims at all) properly concerns the national guarantee, not the state's obligation.

2. Insofar as that doctrine rests on the premise that Article IV, § 4, "textually commits" the guarantee to the political branches, it is even clearer that Article VI, clause 2, "textually commits" each state's judges to assuring compliance with the United States Constitution. Their responsibility is not a secondary result derived from this Court's appellate jurisdiction. Cf., People v. Western Union Tel. Co., 198 P. 146 (Colo. 1921) (popular vote could not prevent state court's enforcement of the Constitution).

3. No tenable theory excuses the state courts from responsibility for deciding an issue of nonrepublican governance in a proper case. It is not a tenable theory that Article IV, § 4, of the Constitution is not law. It is not a tenable theory that the section is only a grant of power to the United States to intervene in state governments, and that the Constitution leaves states legally free to govern by nonrepublican means. Oregon and the Oregon court make no such claim. It is not a tenable theory that the original act of admitting a state precludes future challenges to the republican character of subsequent amendments. And it is not a tenable theory that states indeed are constitutionally obligated to govern by republican means, but that this constitutional obligation is legally meaningless.

Deciding whether a particular means of governmental action is incompatible with any variant of "republican" government, as the Constitution uses that term, is not an impossible task. If, for instance, a political leader claimed power to govern the states' citizens by decrees, without legislative delegation or control, a state court could determine that lawmaking by decree is nonrepublican even if a plebiscite had endorsed such executive power by a majority vote of "yes" (or, elsewhere in this century, "si," "ja," or "da".) The United States Constitution does not leave state courts in the helpless condition of many courts abroad when faced with plebiscitary dictatorships.

This does not imply another form of substantive review of state laws for "civic republicanism", as some recent theories might suggest. The test of republican governance is the legitimacy of a lawmaking process for the kind of lawmaking in question. It is an issue that Congress cannot effectively resolve for a state, but that is entirely suitable for state court determination.

4. Many state courts have in fact reviewed claims of nonrepublican governance on the merits without adverse consequence to the nation. Uniformity among those decisions is

no more essential than uniformity among state constitutions themselves. Moreover, denying state courts that authority does not prevent divergence among state interpretations of the Constitution's command to maintain a "republican form of government." It merely leaves this legal issue to the unreviewable decisions of government lawyers and officials, without the constraint of principled argument and reasoned opinions in the state's courts, as the Oregon court now proposes to leave it in Oregon.

V. CONCLUSION

Because the decision below misinterprets a decision of this Court and conflicts with decisions of other state courts, on an issue of state court authority of fundamental importance to state governments, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Hans A. Linde
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(3)

Supreme Court, U.S.
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No. 97-129

In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L.L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is petitioner's Guarantee Clause claim moot?

2. Are Guarantee Clause claims justiciable in state but not federal court?

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BRIEF IN OPPOSITION

The State accepts petitioner's statement of the opinions below and the constitutional provisions involved.

JURISDICTION

Petitioner filed a timely petition for a writ of certiorari to the Oregon Supreme Court, which denied his federal challenge to a state statute. Although the Court would ordinarily have jurisdiction to consider the petition, *see* 28 U.S.C. § 1257(a), it lacks jurisdiction because the case is moot. Mootness is discussed below as one of the reasons why certiorari should be denied.

STATEMENT OF THE CASE

Because petitioner's statement of the case is not complete, this brief supplements it. It first summarizes the procedural posture in which the issue arises. It then sets out the events that have occurred since the petition was filed.

In 1994, the Oregon voters adopted Measure 11, a statute that sets minimum sentences for certain crimes. *See* 1995 Or. Laws, ch. 2, § 1.[1] In 1995, Bobby Ron Vanzant was convicted of second-degree manslaughter. Under Measure 11, Vanzant should have been sentenced to 75 months for his crime. At sentencing, however, the state trial court ruled that the minimum sentences set out in Measure 11 violate the Equal Protection Clause. The trial court accordingly sentenced Vanzant to 20 months for manslaughter rather than the 75-month sentence that Measure 11 requires.

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[1] Measure 11 is codified as Or. Rev. Stat. § 137.700. Since Measure 11 was adopted, the legislature has amended the statute three times to permit trial courts to impose lesser sentences for some crimes, to add new crimes that are subject to mandatory sentences, and to rewrite the portion of Measure 11 that applies to juveniles. *See* 1997 Or. Laws, ch. 852, § 1; 1995 Or. Laws, ch. 421, § 1; 1995 Or. Laws, ch. 422, § 47. The legislature has not amended the sentence for second-degree manslaughter, the crime for which the defendant in the underlying criminal action was convicted.

Because the State could not challenge the trial court's ruling on direct appeal, it filed a petition for mandamus in the Oregon Supreme Court. Consistent with the then-existing procedures, the State named the trial court judge, the Honorable L.L. Sawyer, as the nominal defendant. *See* Or. Rev. Stat. § 34.110 (1995).[2] Because a petition for mandamus initiates a separate action, Vanzant was not a party to the mandamus proceeding. As the real party in interest, however, he could have intervened in the mandamus proceeding as a matter of right but chose not to do so. *See* Or. Rev. Stat. § 34.130(4) (1995).[3]

After considering the State's mandamus petition and Judge Sawyer's response, the Oregon Supreme Court held that Measure 11 is facially constitutional. *See State ex rel Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145 (1997). The court accordingly issued a writ of mandamus directing Judge Sawyer to impose the statutorily required 75-month sentence on Vanzant in the underlying criminal case. Judge Sawyer filed a timely petition for certiorari.

After petitioning for certiorari, Judge Sawyer held a hearing in the underlying criminal case before resentencing Vanzant. July 30, 1997 Tr. 2–19. In a memorandum filed with the trial court before the hearing, Vanzant raised some of the issues that the Oregon Supreme Court had already addressed in the mandamus proceeding and also argued that a 75-month sentence was cruel

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[2] In 1997, the legislature changed the procedures for filing a mandamus petition in the Oregon Supreme Court. *See* 1997 Or. Laws, ch. 388, § 2. The judge is no longer named as the nominal defendant. *Ibid.* Rather, the adverse party is named as the defendant. *Ibid.*

[3] Pursuant to state law, however, Vanzant's attorney received consent from Judge Sawyer to represent him in the mandamus proceeding. *See* Or. Rev. Stat. § 34.130(4) (authorizing attorney for real party in interest to represent the defendant judge with the judge's consent); *State ex rel Huddleston v. Sawyer*, 324 Or. 597, 600 n. 4, 932 P.2d 1145 (1997) (explaining state procedure).

and unusual as applied to him. Judge Sawyer rejected those challenges. *See* July 30, 1997 Tr. 18. Before imposing sentence on Vanzant, Judge Sawyer noted that the state public defender had filed a petition for certiorari on his behalf, seeking review of the Oregon Supreme Court's decision on mandamus. July 30, 1997 Tr. 18–19. Judge Sawyer told Vanzant that "in order to give [the Court] an opportunity to see whether they are going to grant [c]ertiorari or not," he was going to suspend execution of the sentence. *Ibid.* Vanzant's counsel replied that his client did not want that. Rather, he wanted Judge Sawyer to go ahead and impose the sentence. *Ibid.*

The following colloquy occurred:

> THE COURT: * * * Two weeks ago the State Public Defender filed a petition for [c]ertiorari [to] the United States Supreme Court. They are going to have the last word on this, whether I'm right or somebody else is right. And in order to give them an opportunity to see whether they are going to grant [c]ertiorari or not, I will suspend execution of that sentence until the Supreme Court has answered that question.
>
> [DEFENSE COUNSEL]: Your Honor, I don't know whether or not he wants to proceed that way.
>
> THE COURT: He does if he wants—it's up to him.
>
> [DEFENSE COUNSEL]: He's indicated to me that he would live by the Court's decision, and we discussed this, and I think that's really up to Mr. Vanzant. If I could just have a moment.
>
> THE COURT: Sure.
>
> (Pause in proceedings.)
>
> [DEFENSE COUNSEL]: At this point, he would not ask for that. If he changes his mind, we will file the appropriate motion.

> THE COURT: I can understand where he's coming from because, if they find I'm wrong and say that minimum sentences are constitutional—and that could be two years from now—then he would have to go back to prison two years from now rather than today. He'll have two years out of the way; so I can understand his position. Okay.

July 30, 1997 Tr 18–19. Judge Sawyer accordingly sentenced Vanzant to 75 months imprisonment and entered judgment on July 30, 1997. On September 2, 1997, Vanzant filed a notice of appeal in state court from the judgment in the underlying criminal case.[4]

REASONS WHY CERTIORARI SHOULD BE DENIED

Before discussing why certiorari is not appropriate, this brief first explains why the case is moot.

A. Mootness

This case arises in an unusual posture. The person who has a personal stake in the constitutionality of Measure 11 is Bobby Ron Vanzant. He is serving a 75-month rather than a 20-month sentence as a result of Measure 11. Vanzant, however, did not intervene in the mandamus proceeding, nor has he petitioned for certiorari. Rather, Judge Sawyer was the sole defendant in the mandamus action, and only he is petitioning for certiorari. There

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[4] Because Vanzant has not filed his opening brief in the state court of appeals, it is unclear whether he will challenge his criminal conviction on appeal in the state courts or raise some other issue that would result in his avoiding a Measure 11 sentence altogether. Put another way, with respect to Vanzant's criminal trial, the Oregon Supreme Court's ruling that Measure 11 does not violate the Guarantee Clause is not a final judgment within the meaning of 28 U.S.C. § 1257(a). *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 478–79 (1975) (no final judgment where further proceedings could obviate the need to reach the federal issue). It is simply an interlocutory ruling that occurred midway through Vanzant's state criminal trial and direct appeal.

is a substantial question, however, whether Judge Sawyer has any personal interest in the mandamus proceeding that would give him standing to petition.[5] Even if he does, that interest is moot.

1. Judge Sawyer's interest

Ordinarily, a trial court judge whose ruling is reversed on appeal has no interest that would give him or her standing to petition for certiorari. Judges have no personal stake in their rulings. Rather, they have only an official interest in applying the governing statutes and constitutional provisions. That official interest is not sufficient to confer standing. *See Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312, 2322 (1997) (members of Congress lacked standing to challenge the line-item veto because they "alleged no injury to themselves as individuals"); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994) (state court judges have no personal stake in their rulings that would give rise to an Article III case or controversy); *Pulliam v. Allen*, 466 U.S. 522, 537 n. 18 (1984) (noting proposition with approval); *Valley and Siletz Railroad v. Laudahl*, 296 Or. 779, 788, 681 P.2d 109 (1984) (adjudicative body cannot assume the role of an advocate).

Were the rule otherwise, the dissenting judges on the Oregon Court of Appeals could petition for review in the state supreme court, and the dissenting judges on the Oregon Supreme Court could petition for certiorari. Not only would such a practice be

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[5] As noted above, state procedure permitted Vanzant's attorney to represent Judge Sawyer in the mandamus proceeding. *See Sawyer*, 324 Or. at 600 n. 4, (explaining state procedure). State procedure thus permited Judge Sawyer to act as a medium through which Vanzant could raise his various challenges to Measure 11 in state court. *See ibid.* Article III, however, requires that Judge Sawyer have a personal interest in the matter if Judge Sawyer (and not Vanzant) seeks to pursue Vanzant's challenges in federal court. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).

inconsistent with the notion of neutrality that supposedly informs judicial rulings, but it would run counter to the principle that the majority's decision binds the dissent as well as lower court judges. Institutionally, judges have no enforcement or other role that gives them standing to challenge the constitutionality of a state statute they are charged with applying. *Compare Coleman v. Miller*, 307 U.S. 433, 444 (1938) (administrative and executive officials charged with enforcing a statute have standing to defend it against constitutional challenges); *Boynton v. Hutchinson Gas Co.*, 291 U.S. 656 (1934) (same).

The only fact that potentially distinguishes Judge Sawyer from every other trial judge whose ruling is reversed on appeal is the procedural posture in which this issue arises. Under state procedure, a mandamus proceeding serves the same function as an interlocutory appeal. Judge Sawyer accordingly was named as the nominal defendant on mandamus. The writ of mandamus the Oregon Supreme Court issued was directed to him, and he was subject to a $500 fine if he refused, without good cause, to comply. *See* Or. Rev. Stat. § 34.230. If Judge Sawyer has standing to petition for certiorari, it derives solely from the possibility of a sanction if he refuses to comply with the writ. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989) (adverse state court judgment can give party standing to petition for certiorari);[6] *Board of Education v. Allen*, 392 U.S. 236, 241 n. 5 (1968) (board members faced with choice of adhering to their

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[6] The fact that the state court decided a federal issue is not sufficient to give Judge Sawyer standing to petition for certiorari. *See ASARCO*, 490 U.S., at 623–24; *Doremus v. Board of Education*, 342 U.S. 429 (1952). Rather, Judge Sawyer has standing to petition for certiorari only if the state court judgment results in a "direct, specific, and concrete injury" to him. *ASARCO*, 490 U.S., at 623–24.

view of the constitution or facing sanctions have standing to challenge constitutionality of state law).

It might be a close question whether Judge Sawyer's status as a nominal defendant in a state mandamus proceeding gave him standing to file a petition for certiorari. *Compare D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983) (administrative law judges lack standing to challenge agency instruction even though they could be disciplined for refusing to follow it);[7] *Municipal Court v. Superior Court*, 5 Cal. 4th 1126, 857 P.2d 825, 827–28 (1993) (under California law, nominal defendant in a mandamus proceeding has no cognizable interest in appealing from ruling), *with Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) (reaching issue raised by defendant judge in a federal mandamus action without addressing standing); *La Buy v. Howe Leathers Co.*, 352 U.S. 249 (1957) (same). The Court need not resolve that question, however. Whatever personal interest Judge Sawyer might have had is moot.

2. Mootness

Even if the threat of a fine for noncompliance were sufficient to give Judge Sawyer standing to petition for certiorari, that threat was extinguished once he complied with the writ. At that point, he was no longer subject to a fine, and his interest became indistinguishable from that of any other trial judge whose ruling has been reversed on appeal and the case remanded for further proceedings. At that point, Judge Sawyer had at most an abstract

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[7] The Seventh Circuit reasoned in a related context, "if administrative law judges do not have standing to bring [a] suit [in the first instance to challenge the agency's interpretation of the social security laws,] they cannot confer it on themselves bootstrap fashion, by disobeying the instruction and then complaining that their disobedience laid them open to discipline." *D'Amico*, 698 F.2d, at 906.

or official interest in the constitutionality of the sentence he had imposed on Vanzant.

To be sure, a party's compliance with a court's judgment ordinarily will not moot a case as long as the consequences of compliance can be set aside. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981); *Mancusi v. Stubbs*, 408 US 204, 206–07 (1972). In this case, however, compliance with the writ of mandamus completely extinguished the sole basis for saying that Judge Sawyer had standing to petition for certiorari—the threat of a sanction if he refused to comply. Reversing the state court judgment will restore nothing to Judge Sawyer. This case thus differs from the mine run of cases in which a defendant, under court order, pays a sum of money to the plaintiff, which can be repaid if the judgment is reversed.

To avoid any misunderstanding, the State does not dispute that if the Court were to hold that Measure 11 violates the Guarantee Clause, that holding could potentially affect Vanzant. But the Court's holding would have no effect on Judge Sawyer. Judge Sawyer has no personal stake in the length of Vanzant's sentence. Because only Judge Sawyer has petitioned for certiorari, his petition is moot.

Vanzant, of course, remains free to raise his Guarantee Clause claim in a petition for certiorari if that claim is raised and resolved by the final judgment in his state court criminal proceeding. *See* 28 U.S.C. § 1257(a). Nor is it inappropriate to require Vanzant to wait until the judgment in his state criminal trial is final before raising the issue on certiorari. As explained above, with respect to Vanzant, the Oregon Supreme Court's decision on Measure 11 is simply an interlocutory ruling midway through his criminal trial and state appeal. *See* note 4 *supra*.

Until the state courts issue a final judgment in his criminal case, the Court has no jurisdiction to act on any federal challenge Vanzant might make to Measure 11. *See* 28 U.S.C. § 1257(a); *Cox Broadcasting*, 420 U.S., at 478–79.[8]

One final point should be noted. This is not a case that is capable of repetition yet evading review. *Weinstein v. Bradford*, 423 US 147, 149 (1974). The issue is not one that ordinarily will evade review. Virtually any criminal defendant who is sentenced under Measure 11 can petition for certiorari without fear that the sentence will expire while the petition is pending. *See* Or. Rev. Stat. § 137.700 (listing minimum sentences). Moreover, for the case to recur for Judge Sawyer in a way that would give him standing, he would have to refuse to follow the Oregon Supreme Court's holding in the future in order to be subject to a second mandamus proceeding. The Court has hesitated to assume that a person will not comply with the law in determining whether they have standing. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). One should be equally hesitant to assume that a state trial court judge would willfully refuse to follow controlling state supreme court precedent. Because this case is moot, Judge Sawyer's petition for certiorari should be denied.

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[8] The general rule that compliance with a court order will not moot a case does not apply for a second reason. The Court explained in *Mancusi* that even though forced compliance with a court order ordinarily will not moot a case, the result would be different if a person who is under no obligation to comply takes action that results in compliance. 408 U.S., at 206 n 1 (distinguishing *SEC v. Medical Committee*, 404 U.S. 403 (1972)). In this case, the writ of mandamus was directed to Judge Sawyer. Vanzant was under no compulsion to ask Judge Sawyer to proceed with the sentencing. When Vanzant voluntarily asked Judge Sawyer not to suspend execution of the sentence and Judge Sawyer acquiesced in that request, any claim that Judge Sawyer may have became moot.

B. Certiorari is not warranted

Even if Judge Sawyer's federal claim were not moot, this is not an appropriate case in which to grant certiorari. The Oregon Supreme Court's decision is consistent with a long line of decisions from the Court. In holding that Guarantee Clause claims are not justiciable, the Court has not limited its decisions to the federal courts. Rather, it has applied the same rule equally to both state and federal courts. Nor is there a conflict among the lower courts that would warrant granting certiorari. No court has held, as petitioner urges, that state courts may decide Guarantee Clause claims that federal courts may not. In declining to adopt the position petitioner advanced, the Oregon Supreme Court did not create a conflict. It avoided one.

Perhaps petitioner's claim is simply a sport,[9] or it may mark a resurgence of interest in an issue that many had regarded as settled for some time. In either event, the appropriate course is not to grant certiorari now. Rather, the issue should be allowed to percolate among the lower courts. The Oregon Supreme Court has staked out a clear position that is consistent with both the Court's decisions and those of the other state courts. So far, the one other state court that has considered the Oregon Supreme Court's reasoning has agreed with it. But if, in the future, other courts were to disagree and a sharply drawn conflict were to emerge, then it might be appropriate to consider granting certiorari to resolve it. No conflict exists now, however, that warrants certiorari.

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[9] In seeking to avoid the force of the Court's cases, petitioner explains that other litigants have not argued, as he does, that the Court's Guarantee Clause decisions apply only to federal courts. *See* Pet. for Cert. 13–14.

1. The Court's decisions

Since 1912, the Court has held that Guarantee Clause claims are not justiciable. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *see City of Rome v. United States*, 446 U.S. 156 (1980); *Baker v. Carr*, 369 U.S. 186 (1962). Petitioner does not argue that *Pacific States* or the cases that follow it were wrongly decided, nor does he ask the Court to reconsider those decisions. He argues instead that those cases establish only that Guarantee Clause claims are not justiciable in federal court. *Pacific States* and its progeny, he argues, do not foreclose state courts from deciding Guarantee Clause claims even though federal courts may not reach them.[10]

Petitioner's argument seems at odds with the Court's decisions. In concluding that Guarantee Clause claims are not justiciable, the Court has never held that its decisions apply only to the federal courts. It has never said that state courts are free to decide Guarantee Clause claims that federal courts cannot, nor has it reserved or even noted that issue. Rather, as the Oregon Supreme Court explained, the terms the Court has used to describe its holdings apply equally to state and federal courts. *See State ex rel Huddleston v. Sawyer*, 324 Or., at 621–22. The Court has explained that Guarantee Clause claims are committed "exclusively" or "solely" to Congress, not to the "courts" generally. *See ibid.* If the Court had intended to draw the distinction petitioner perceives, it presumably would have used different terms.

On several occasions, the Court has affirmed state court judgments holding that Guarantee Clause claims are not justicia-

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[10] Petitioner properly has limited his claim on certiorari to the federal question he presented in state court. *See Sawyer*, 324 Or., at 620–21 (describing petitioner's position on justiciability).

ble. *See Cochrane v. Louisiana State Board of Education*, 281 U.S. 370 (1930); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *cf. Ohio ex rel Bryant v. Akron Park District*, 281 U.S. 74 (1930). Following *Pacific States*, the Louisiana Supreme Court in *Cochrane* and the Washington Supreme Court in *Mountain Timber* held that Guarantee Clause claims are not justiciable in state court. *See Cochrane v. Louisiana Board of Education*, 168 La. 1030, 1032–33, 123 So. 664 (1928); *State v. Mountain Timber Co.*, 75 Wash. 581, 590, 135 P. 645 (1913). The Court granted review in both cases, and the petitioners[11] renewed their Guarantee Clause claims. The Court affirmed in both cases reasoning, as the state courts had, that Guarantee Clause claims are "committed to Congress and not to the courts." *Mountain Timber*, 243 U.S., at 234; *accord Cochrane*, 281 U.S., at 374.

Nothing in the opinions in either *Cochrane* or *Mountain Timber* suggests that the Court disagreed with the lower courts' resolution of the petitioners' Guarantee Clause claims. If the Court had believed, as petitioner urges here, that Guarantee Clause claims are justiciable in state but not federal court, it presumably would have said so. Had it agreed with petitioner's view, the Court presumably would have reversed and remanded that portion of the judgment so that the state courts could decide the Guarantee Clause claims that it was foreclosed from considering. The Court did not take that course, however.[12]

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[11] Although one case arose on appeal and the other on a writ of error, for ease of reference this brief refers to the parties who lost in state court as the "petitioners" in this Court.

[12] In arguing that the Court's decisions in *Cochrane* and *Mountain Timber* do not mean very much, petitioner focuses on the Court's disposition of the state courts' judgments. He argues that because both cases involved a justiciable issue (a Fourteenth Amendment claim) and a non-justiciable issue (a Guarantee Clause

(continued...)

The same conclusion follows from another case arising out of state court, *Ohio ex rel Davis v. Hildebrant*, 241 U.S. 565 (1916). In *Davis*, the Court held that a Guarantee Clause challenge to Ohio's use of the referendum failed because that question was solely one for Congress to resolve and it had done so. *Id.*, at 569–70. In explaining why the petitioner's contrary argument lacked merit, the Court reasoned:

> [A]t best the [petitioner's argument] comes [down] to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government, has done something which it is deemed is repugnant to that guarantee, therefore there was automatically created judicial authority to go beyond the limits of judicial authority and in doing so to usurp congressional power on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control free from judicial interference.

241 U.S., at 570. So stated, the argument fell of its own weight. *Ibid.*

It is difficult to square the Court's reasoning in *Davis* with petitioner's argument here. The Court's reasoning does not suggest that state courts retain the power to decide Guarantee

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[12](...continued)

claim), the Court could not dismiss for want of jurisdiction. Pet. for Cert. 12. Rather, he argues that "the Court either had to affirm or reverse the state courts' judgments." Pet. for Cert. 12–13.

Petitioner's focus seems surprising. It would seem that the Court's reasoning is more telling than its disposition of the state court's judgments. But even if the disposition were dispositive, petitioner's argument appears to rest on an incorrect premise. If the Court believed that the state courts had decided the Fourteenth Amendment claim correctly but erred in not reaching the Guarantee Clause claim, it was not required to affirm or reverse. Rather, it could have affirmed in part, reversed in part, and remanded to permit the state courts to decide the Guarantee Clause claims.

Clause claims even though federal courts do not. Rather, it is based on the proposition that "the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government" on Congress. The Court's conclusion that any judicial interference would be a "usurp[ation]" of that authority applies equally to both state and federal courts. Put another way, if the Court had believed, as petitioner argues, that the Ohio courts retained the power to decide whether Congress had misapplied the Guarantee Clause, it presumably would have said so and remanded the case to allow those courts to decide that issue.

In declining to accept petitioner's argument that state courts may decide Guarantee Clause claims that the federal courts may not, the Oregon Supreme Court aligned itself with a long line of this Court's decisions. Petitioner argues, however, that two more recent cases have called those decisions into question. He relies initially on *Baker v. Carr*, but *Baker*'s holding and reasoning support the Oregon Supreme Court's decision. The Court reaffirmed in *Baker* that Guarantee Clause claims are not justiciable. 369 U.S., at 222–23. The Court reasoned that "the commitment to the other branches" of this issue, the other branches' action on this question, the need for finality in their decisions, and the "lack of criteria by which a court c[an] determine which form of government [i]s republican" lead to the conclusion that Guarantee Clause claims are not justiciable. 369 U.S. at 222–23. In reaching that conclusion, the Court relied primarily on the fact that "the Guarantee Clause is not a repository of judicially manageable standards which a court [can] utilize independently in order to identify a State's lawful government." *Id.*, at 223.

Those considerations apply equally to state and federal courts. When the Court has recognized that there is a "lack of

criteria by which a court c[an] determine which form of government [i]s republican," it is difficult to see how a state court is free to discover enforceable criteria in the Guarantee Clause. As the Court explained in *Oregon v. Haas*, 420 U.S. 714, 719 (1975), "a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original). Far from calling the Oregon Supreme Court's decision into question, the reasoning in *Baker* supports it.

Petitioner also relies on *New York v. United States*, 505 U.S. 144 (1992). In that case, the Court raised the question but did not decide whether federal courts are barred from deciding all Guarantee Clause claims. *Id.* at 185. Petitioner fails to consider the context in which the Guarantee Clause claim arose in *New York*. The issue in *New York* was whether the Guarantee Clause prevents the federal government from restricting state authority. The Clause was not invoked by a private litigant as a limit on what the State can do. It was invoked by the State as a limit on what the federal government can do.

The difference matters. In noting that contemporary commentators have suggested that the Court should address the merits of Guarantee Clause claims, "at least in some circumstances," the Court initially cites page 398 of Tribe's treatise on constitutional law. 505 U.S., at 185. On that page, Tribe explains: "[I]t need not follow from the unavailability of the guaranty clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 398 (2d ed 1988) (emphasis in original). Tribe explains that the Guarantee Clause may provide a textual basis for States to argue that the federal government's actions violate principles of federalism. *Ibid.* As

Tribe notes, "It is, after all, the states to which the clause extends its explicit guarantee."[13] *Ibid.*

The observation in *New York* does little to suggest that the issue petitioner raises merits a grant of certiorari. The apparent focus of the Court's concern in *New York* was the State's ability to raise the Guarantee Clause, not an individual's ability to raise it. Beyond that, the issue the Court noted seems antithetical to the one petitioner raises. In *New York*, the Court questioned whether federal courts might be free to consider some Guarantee Clause claims. Petitioner, however, assumes that federal courts cannot consider Guarantee Clause claims. Rather, he argues that state courts should be free to consider Guarantee Clause claims that federal courts cannot. Whatever the Court's observation in *New York* may suggest, one thing seems fairly clear: It does not suggest that state courts are free to decide Guarantee Clause claims that federal courts cannot decide. The observation in *New York* adds little to petitioner's claim that the issue he pursues warrants certiorari.

2. No conflict among the state courts

Before 1912, the decisions on the Guarantee Clause did not all look in the same direction. The first case to consider a Guarantee Clause claim held that the question was committed to Congress, not the courts. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). After *Luther*, however, state and federal courts reached Guarantee Clause claims and decided them on the merits. *See, e.g., In re Duncan*, 139 U.S. 449 (1891); *Minor v. Happersett*,

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[13] The article by Deborah Merritt, which the Court also cites, is consistent with Tribe's discussion. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70–78 (1988). Other authorities the Court cites argue for a broader exercise of jurisdiction, but only Tribe's and Merritt's discussion are consistent with the notions of federalism that inform the Court's decision in *New York*.

88 U.S. (21 Wall.) 162 (1875); *Kadderley v. Portland*, 44 Or. 118, 74 P. 710, 75 P. 222 (1903). In 1912, when faced with a case raising substantially the same issue as this case, the Court returned to its holding in *Luther* that Guarantee Clause claims are not justiciable. *Pacific States*, 223 U.S., at 151.

Since 1912, virtually all the state courts that have addressed the issue have held, as the Oregon Supreme Court did here, that Guarantee Clause claims are not justiciable in state court. *See State v. Davis*, ___ Wash.2d ___, 943 P.2d 283, 286 (1997); *California Gillnetters v. Department of Fish & Game*, 39 Cal. App.4th 1145, 1163, 46 Cal. Rptr2d 338 (1995); *In re Natural Resources Development Act*, 47 Ill.2d 81, 264 N.E.2d 129, 133 (1970); *Jackman v. Bodine*, 188 A.2d 642, 647 (N.J. Super. 1963) (Paschman, J.); *Baum v. Newbry*, 200 Or. 578, 267 P.2d 220 (1954); *Borden v. Louisiana State Board of Education*, 168 La. 1005, 1023, 123 So. 655 (1928). The one case that has considered the issue since the Oregon Supreme Court decided this case specifically noted and agreed with the Oregon Supreme Court's decision. *See Davis*, 943 P.2d, at 286 n. 2.

Conversely, no state or federal court has held, as petitioner urges, that state courts may decide Guarantee Clause claims even though federal courts may not, although one state court decision did raise that possibility. *See State v. Montez*, 309 Or. 564, 603-04, 789 P.2d 1352 (1990). In *Montez*, the Oregon Supreme Court noted that state courts may be able to decide Guarantee Clause claims even though federal courts cannot, but it did not base its holding on that proposition. *Ibid.* Since then, no court has followed *Montez*, and the Oregon Supreme Court's decision in this case disclaims it. *Sawyer*, 324 Or., at 621 n. 19. *Sawyer* makes clear that the suggestion in *Montez* retains no vitality in

Oregon. *Ibid.* At most there was an intra-state conflict,[14] which the Oregon Supreme Court's decision in this case resolved.

Petitioner and the amicus brief, however, say that there is a "contemporary conflict in state decisions." Am. Br. 5 (capitalization omitted). They only cite, however, three cases in which state courts have specifically addressed justiciability. In one of the three cases, *In re Initiative Petition No. 348*, 820 P.2d 772, 779 n. 21 (Okla. 1991), the Oklahoma Supreme Court noted the issue but did not resolve it. In a later case, the Oklahoma Supreme Court made clear that it took "no stand on the justiciability of the issue." *Fraternal Order of Police v. Choctaw*, 933 P.2d 261, 270–71 (Okla. 1996).[15]

In the second of the three cases, the trial court had rejected the plaintiff's Guarantee Clause claims without any explanation. *See Iman v. Southern Pacific Co.*, 7 Ariz. App. 16, 435 P.2d 851, 854–55 (1968). On appeal, the Arizona Court of Appeals held that Guarantee Clause claims are not justiciable and reasoned that the trial court's unexplained ruling properly could have rested on that ground. *Ibid.* The court noted alternatively that if the trial court had reached the merits, it correctly held that the initiative is consistent with the Guarantee Clause. *Ibid.*

In the last of the three cases, the Kansas Supreme Court held in 1973 that neither federal nor state courts are precluded from addressing some kinds of Guarantee Clause claims. *See Van Sickle v. Shanahan*, 511 P.2d 223, 232–34 (Kan. 1973). Almost

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[14] Before the suggestion in *Montez*, the Oregon Supreme Court had squarely held in *Baum v. Newbry*, 200 Or., at 585, that Guarantee Clause claims are not justiciable in state court.

[15] In both cases, the Oklahoma Supreme Court followed the Court's lead in *New York*. It declined to decide whether the issue was justiciable holding instead that the claim had no merit. *See Fraternal Order of Police*, 933 P.2d, at 270–71; *In re Initiative Petition No. 348*, 820 P.2d, at 779.

25 years have passed since *Van Sickle* was decided. No court has followed it, and it does not address the issue petitioner seeks to raise here—whether state courts can decide Guarantee Clause claims that the federal courts cannot. Finally, the amicus brief lists five cases in which state courts dismissed Guarantee Clause claims on the merits without ever considering whether they were justiciable. *See* Am. Br. 6.

Those cases provide no basis for saying that there is a conflict that requires resolution. One case takes no position on the issue, another agrees with the Oregon Supreme Court,[16] a third addresses a different issue, and the remaining decisions never even consider the issue. Something far more than that is required before it can be said that there is a clearly drawn split among the state courts that warrants certiorari.

3. State and federal courts

Petitioner's argument that Guarantee Clause claims are justifiable in state court but not federal courts (including this Court) raises one final concern. It seems at odds with the long-standing principle that the Court is the final arbiter of the federal constitution and sits to ensure that the state courts interpret federal law uniformly. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816). Under petitioner's view, each state court would be the final arbiter of what the Guarantee Clause means within that State. The Court would be powerless to review any of those decisions, no matter how much the various state courts differed or how implausible their interpretations of the Guarantee Clause. And the citizens of a State would effectively be power-

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[16] In reviewing the state court decisions, the Washington Supreme Court regards the Arizona Court of Appeals' decision in *Iman* as supporting the proposition that Guarantee Clause claims are not justiciable. *See Davis*, 943 P.2d, at 286.

less to change their state court's interpretation of federal law.[17] *Compare Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 284 (1913) (holding in a related context, that a similar rule was unacceptable because it would result in constitutional paralysis).

Petitioner, however, relies on a separate opinion in *ASARCO* to discount that concern. *See* Pet. for Cert. 16 (quoting *ASARCO*, 490 U.S., at 636 (Rehnquist, C.J., concurring and dissenting)).[18] He argues that unreviewable state court interpretations of federal law are a "'rather unremarkable proposition.'" *Ibid.* The portion of the separate opinion that petitioner quotes, however, expresses the dissent's views, not those of the majority. More importantly, the issue in *ASARCO* differs from the issue here. If the dissent had prevailed in *ASARCO*, the Court would have been precluded from deciding whether the state court's resolution of the federal issue in that case was correct, but it would not have been precluded from deciding the same federal issue in another case.[19] Under petitioner's proposal, however, the Court would be precluded from reviewing an entire class of federal claims. Under petitioner's view, no state court

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[17] The citizens of each State retain the power to amend their own state constitutions, but it would be a far more daunting task for one State's citizens to amend the federal constitution if they believed that their state courts had misinterpreted the Guarantee Clause.

[18] The amicus brief quotes from the same opinion at greater length. *See* Am. Br. 8.

[19] In *ASARCO*, the state court plaintiff lacked Article III standing. If the dissent in *ASARCO* had prevailed, the Court would have been precluded from deciding whether the Arizona state courts had correctly decided the federal issue in that case, but it would not have been precluded from deciding the same federal issue in another case where the plaintiff had standing. At most, the dissent's view would have precluded the Court from either error correcting or from reaching a significant federal issue in the first case to present it. It would not have precluded the Court from ever reaching the issue, as petitioner would.

Guarantee Clause decision would be reviewable. There is a difference in magnitude between those two propositions.

Perhaps that is not an insurmountable hurdle. But it at least should give one pause. At a minimum, the novelty of petitioner's position suggests that this is the sort of issue that should percolate among the lower courts before the Court considers granting certiorari. At this point, no court has held that state courts may decide Guarantee Clause claims that federal courts may not. The Oregon Supreme Court has staked out a clear position, and the one court that has considered the Oregon Supreme Court's decision has agreed with it. If, in the future, other state courts were to adopt the theory petitioner urges, perhaps it would be appropriate then to consider granting certiorari to resolve it. At this time, no conflict exists that would warrant granting certiorari.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

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No. 97-129

In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L. L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent.

PETITIONER'S REPLY BRIEF

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Or. Rev. Stat. § 138.083 5

Miscellaneous

Ballot Measure 11 (1994) 1,4,5,6,7,8,9

PETITIONER'S REPLY BRIEF

Respondent State of Oregon claims that events occurring subsequent to petitioner Judge Sawyer's filing of his certiorari petition moot this case. This mootness claim raises a "new point[]" which authorizes this reply brief. Supreme Court Rule 15.6.

The primary basis for the state's mootness claim is Judge Sawyer's subsequent compliance with the Oregon Supreme Court's peremptory writ of mandamus. The writ

> commanded [the judge] forthwith to enter a corrected judgment in the case of State v. [Bobby Ron] Vanzant, . . . imposing the [75-month prison] sentence for the crime of second degree manslaughter required by [Ballot Measure 11].

Petition for Writ of Certiorari at App. 74-75, State ex rel. Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997), petition for cert. filed sub nom. Sawyer v. State ex rel. Huddleston (July 21, 1997) (No. 97-129).

In his certiorari petition, Judge Sawyer apprised this Court that at an ensuing hearing, he would comply with the peremptory writ's command, and resentence Vanzant. Petition for Writ of Certiorari at 4 n. 2, at 16 n. 3. The judge complied at a July 30, 1997 resentencing hearing. But before imposing the 75-month Measure 11 sentence, he stated that "the Oregon Supreme Court has said that Measure 11 is facially constitutional. I don't agree with them obviously." July 30, 1997 Tr. 17. Although he acknowledged that "I am bound by [the Oregon Supreme Court's] rulings," id., the judge also said that 75 months is "not a sentence I would impose without [Measure 11], given the facts of the case . . . ." Id. at 18.

Judge Sawyer thus made clear that absent the writ's command, he would not give Vanzant a 75-month Measure 11 sentence. Instead, he would stand by the 20-month guidelines

sentence he originally imposed. According to the state, Judge Sawyer's "compliance with the writ of mandamus" moots the case, for it "completely extinguished the sole basis for saying that [he] had standing to petition for certiorari--the threat of sanction if he refused to comply." Respondent's Brief in Opposition at 8. Thus, the state claims, the judge has no legally cognizable interest in the case (and also may lack standing to pursue the claim). As will be explained below, the state's mootness claim is factually and legally untenable.

But before beginning that explanation, a preliminary point is in order. While this case was in the Oregon Supreme Court, the state advanced several arguments against the court's jurisdiction over the merits of Judge Sawyer's Guarantee Clause claim. Among them was that **this** Court could not be "final arbiter" on the accuracy of the state court's decision on this particular type of federal question. See Brief in Opposition at 19-21 (renewing argument).

By now urging this Court to deny certiorari, the state oscillates. The Oregon Supreme Court agreed with the claim that state courts lack jurisdiction over the merits of this particular type of federal question. The ineluctable consequence of the state's opposition to certiorari is that this Court would not be "final arbiter" on the accuracy of the Oregon Supreme Court's decision on a federal question.

A. Petitioner's Legally Cognizable Interest in a Viable Issue

In his certiorari petition, Judge Sawyer asks this Court to review the Oregon Supreme Court's holding that it lacked jurisdiction to decide the judge's claim that Measure 11 is invalid under the republican Guarantee Clause. U.S. Const. Art. IV, § 4. The case is moot only if the issue is dead, or if Judge Sawyer has no legally cognizable interest in it. Murphy v. Hunt, 455

U.S. 478, 481 (1982). State and federal law make clear that the case is not moot.

In State ex rel. Motor Vehicles Div. v. Norblad, 320 Or. 307, 882 P.2d 598 (1994), relator Motor Vehicles Division (MVD) suspended licensee/intervenor McBride's driver's license. McBride's attorney persuaded defendant Judge Norblad to order MVD to rescind its suspension of McBride's license. A few days later, MVD rescinded the suspension, but simultaneously asked the judge to vacate or stay his order requiring the rescission. After the judge denied MVD's vacate-or-stay request, MVD sought mandamus relief in the Oregon Supreme Court. 320 Or. at 310-11.

On mandamus, McBride claimed that MVD's rescission of its suspension order mooted the case. Id. at 311. In rejecting that claim, the Oregon court said,

> "An agency can withdraw an order completely." MVD exercised that authority when it rescinded its . . . suspension order. MVD's sole purpose in rescinding its suspension order was to comply with defendant judge's order while contesting the validity of the order through other legal channels. Under the circumstances, we are satisfied that defendant judge's order has a continuing effect on MVD's actions vis-a-vis [McBride]. Accordingly, the dispute is not moot.

Id. at 312 (quoting State ex rel. Hall v. Riggs, 319 Or. 282, 293, 877 P.2d 56 (1994)).

Norblad establishes that the dispute in the case sub judice too is viable. Judge Sawyer's "sole purpose in" resentencing Vanzant "was to comply with" the Oregon Supreme Court's peremptory writ of mandamus "while contesting the validity of the [writ] through other legal channels," i.e., certiorari. Id. at

312. Furthermore, there most certainly is something to contest in the judge's case.

Presently, there is no decision on the merits of Judge Sawyer's Guarantee Clause claim. Thus, his case presents a viable issue: Is the judge's Guarantee Clause claim correct, thus invalidating both the peremptory writ and Bobby Ron Vanzant's Measure 11 sentence? Or is the judge's Guarantee Clause claim incorrect, thus validating the writ and Vanzant's Measure 11 sentence?

Furthermore, Judge Sawyer has a legally cognizable interest in the issue. The judge based one of his alternative claims against Measure 11 on the Oregon Constitution's separation of powers. He argued that in cases such as Vanzant's, where the measure completely removes judicial discretion in determining the appropriate sentence, the measure "'eviscerates the judiciary's inherent (historically shared) sentencing powers.'" Sawyer, 324 Or. at 614.

In rejecting the claim, the Oregon court explained that with the exception of contempt of court situations, "the 'power to declare what punishment may be assessed against those convicted of crime is not a judicial, but [exclusively is] a legislative, power.'" Sawyer, 324 Or. at 615 and n. 13 (quoting State v. Smith, 128 Or. 515, 524, 273 P.2d 323 (1929)).

> "When a court acts beyond the bounds of its sentencing authority, it infringes upon the power of the legislature to determine the manner of punishment. A sentence must be in conformity with the governing statute; any non-conforming sentence is void for lack of authority and thus totally without legal effect." (Citations omitted.)

Sawyer, 324 Or. at 615 (quoting State v. Leathers, 271 Or. 236, 240, 531 P.2d 901 (1975)).

State v. Leathers reiterates the "general rule" in Oregon that if a sentencing court imposes a legislatively unauthorized sentence, "'the judgment . . . is illegal and void, [for] the trial court has not exhausted its jurisdiction since it has in fact failed to pronounce any sentence.'" 271 Or. at 240 (quoting Gladden v. Kelly, 213 Or. 197, 200, 324 P.2d 486 (1958)). If the court discovers that it has imposed an invalid sentence, the court has "the duty to take corrective action and to impose a valid sentence." Leathers, 271 Or. at 240. Cf. United States v. Morgan, 346 U.S. 502, 506 (1954) (describing similar authority for federal courts). The court may do so, even if the case is on direct appeal. Or. Rev. Stat. § 138.083 ("[t]he sentencing court shall retain authority irrespective of any notice of appeal after entry of judgment of conviction . . . to delete or modify any erroneous term in the judgment"). See State v. Graham, 143 Or. App. 85, 87-88, 923 P.2d 664 (1996) (explaining Or. Rev. Stat. § 138.083). Moreover, the court may "take corrective action and impose a valid sentence" even if the sentence has been executed, i.e., the correctional authorities have taken custody of the defendant. Leathers, 271 Or. at 240 (if an executed "sentence is void for lack of sentencing authority," the trial court retains authority to correct it). See especially State v. Cotton, 240 Or. 252, 253-54, 400 P.2d 1022 (1965) (where applicable statute mandated imprisonment in state penitentiary, court erred in sentencing defendant to one year in county jail; moreover, court validly corrected the place of incarceration and increased the length of incarceration to three years, for "[t]he original sentence was void and it was the duty of the trial court when the error was called to its attention, or on its own motion, to impose a valid sentence").

This body of Oregon law establishes that if Judge Sawyer now were to determine that Measure 11 is unconstitutional, that determination would establish that the 75-month sentence he was

forced to impose at resentencing is legislatively unauthorized, and that the corrected judgment is void. Sawyer, 324 Or. at 615.

For example, just as "an agency can withdraw an order completely," Riggs, 319 Or. at 293, a court can overrule a prior decision which is not secured by stare decisis. See, e.g., Hammond v. Central Lane Communications Center, 312 Or. 17, 26, 816 P.2d 593 (1991). Suppose that in a subsequent case, the Oregon Supreme Court were to overrule its decision in Sawyer, and hold that Measure 11 is invalid under the Guarantee Clause. That invalidation would inform Judge Sawyer that Vanzant's Measure 11 sentence is unauthorized and void. Moreover, it would inform the judge that he now has the power and duty, upon motion or sua sponte, "to take corrective action and to impose a valid sentence," e.g., the 20-month guidelines sentence he originally imposed. Leathers, 271 Or. at 240; Cotton, 240 Or. at 254.

Furthermore, the judge's duty to take corrective action and to impose a valid sentence would not rest solely on state law. It also would rest on federal law. In the above hypothetical, the federal constitution's Guarantee Clause is the basis for invalidating Measure 11. Therefore, the federal constitution would oblige the judge to fulfill his duty of taking corrective action and imposing a valid sentence. U.S. Const. Art. VI ("[t]his Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby"). See also Howlett v. Rose, 496 U.S. 356, 367 (1990).

Except for one thing: If the hypothetical were to become reality, Judge Sawyer could not fulfill his state and federal duty. For if he did, he would be subject to sanction by the Oregon Supreme Court, vis à vis its peremptory writ of mandamus. So before fulfilling his duty, he first would have to secure dismissal of the writ.

Precisely the same thing must be said about Judge Sawyer's case as it now stands. If the judge were to achieve what he ultimately seeks--the invalidation of Measure 11 under his Guarantee Clause claim--the Oregon Supreme Court would dismiss the peremptory writ. This dismissal would free the judge to fulfill his state and federal duty of replacing the invalid, 75-month Measure 11 sentence with a valid guidelines sentence (e.g., the 20-month sentence the judge originally imposed). Thus, the peremptory writ "has a continuing effect on [Judge Sawyer's] actions vis-a-vis [Vanzant]." Norblad, 320 Or. at 312.

In sum, this case presents a viable issue: The validity of Measure 11 under the Guarantee Clause. The judge has **and will have** a legally cognizable interest in that issue until his power and duty to correct Vanzant's Measure 11 sentence come to an end. U.S. Const. Art. VI; Howlett, 496 U.S. at 367; Sawyer, 324 Or. at 615; Leathers, 271 Or. at 240; Cotton, 240 Or. at 254. Unless "the Governor of [Oregon] should pardon" Vanzant sometime sooner, Mancusi v. Stubbs, 408 U.S. 204, 206 n. 1 (1972), the judge's power and duty will not end until sometime next century, when Vanzant completes the 75-month term.[1] State v. Swikert, 65 Or. 286, 288, 132 P. 709 (1913) (claims against judgment of imprisonment are viable for duration of judgment's effectiveness); State v. Lincoln, 5 Or. App. 138, 140-41, 483 P.2d 92 (1971) (where defendant completed prison term and suffered no collateral consequences from it, his challenge to validity of term's duration was moot). "Accordingly, the dispute

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[1] Vanzant committed his crime and was arrested for it on June 18, 1995. Sawyer, 324 Or. at 599. Because he could not make bail, he stayed in custody. Telephone interview with Jeannie Barrows, records deputy of the Jackson County Jail (Oct. 10, 1997). He thus began serving his 75-month sentence on June 18, 1995. North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). September 18, 2001 is 75 months after Vanzant's initial custody date, so it is the earliest possible date Vanzant could complete the prison term.

is not moot." Norblad, 320 Or. at 312. Accord Church of Scientology v. United States, 506 U.S. 9, 14 (1992).

Finally, the fact that at resentencing Judge Sawyer imposed a Measure 11 sentence has no bearing on whether this case is moot. The state itself concedes that the judge acted under threat of sanction by the Oregon Supreme Court. This Court has explained that if a petitioner's "'action was merely obedience to the judgment now here for review,'" the action does not moot out the case. Mancusi, 408 U.S. at 207 (quoting Bakery Drivers v. Wagshal, 333 U.S. 437, 442 (1948)).

B. No Deference to Vanzant's Wishes

The state makes a secondary claim that the judge's deference to Vanzant's desire for immediate execution of his Measure 11 sentence moots the case. Brief in Opposition at 9 n. 8. Pertinent Oregon law defeats that claim.

The Oregon Criminal Code states:

> **Except when a person is convicted of a felony committed on or after November 1, 1989**, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the . . . execution of any part of a sentence . . . .

Or. Rev. Stat. § 137.010(3) (emphasis added).

This statute means what it says: A trial court **may not** suspend execution of a sentence for a felony committed on or after November 1, 1989. Id. See also 29 Op. Att'y Gen. 157, 158 (Ore. 1959) (absent express statutory authority, trial court cannot suspend execution of sentence). Defendant Vanzant committed a Class B felony on June 18, 1995. Sawyer, 324 Or. at 599 and n. 1. Thus, Judge Sawyer imposed sentence for a felony committed **after November 1, 1989**. Owing to the crime date, the judge lacked authority to suspend execution of

Vanzant's sentence. Or. Rev. Stat. § 137.010(3); 29 Op. Att'y Gen. at 158. So even if Vanzant had wanted a suspension of execution, the judge could not have deferred to Vanzant's wishes, for the judge lacked authority to do anything other than execute the sentence. The state's secondary basis for its mootness claim fails.

C. The Judge's Standing

For the same reason it claims Judge Sawyer has no legally cognizable interest in the issue in his case, the state also suggests the judge lacks standing. Brief in Opposition at 5-7. Likewise, for the same reason the judge has a legally cognizable interest, he also has standing.

Presently, there is no ruling on the merits of Judge Sawyer's claim that Measure 11 is invalid under the Guarantee Clause. Whether a state court has jurisdiction to pass on such a claim is the issue before this Court.

The Oregon Supreme Court's peremptory writ threatens Judge Sawyer with sanctions if he were to declare Measure 11 invalid under the Guarantee Clause, and then replace Bobby Ron Vanzant's Measure 11 sentence with a guidelines sentence. The writ thus enjoins the judge from exercising his power and fulfilling his duty of correcting an invalid sentence. U.S. Const. Art. VI; Howlett, 496 U.S. at 367; Sawyer, 324 Or. at 615; Leathers, 271 Or. at 240; Cotton, 240 Or. at 254. The writ causes the judge "direct, specific, and concrete injury," thereby

establishing his standing to petition for certiorari. Asarco Inc. v. Kadish, 490 U.S. 605, 623-24 (1989).

Respectfully submitted,

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